SUPREME COURT OF NOVA SCOTIA
Citation: *Landry v. Kidlark*, 2019 NSSC 128

Date: 2019 04 29
Docket: PIC 453177
Registry: Pictou

Between:

Joseph Philip Bernard Landry

Applicant

v.

Jeffrey G. Kidlark and Joan C. McKale

Respondents

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	March 7, 2019, in Pictou, Nova Scotia
Counsel:	Anne MacDonald, for the Plaintiff Self-represented Defendants

By the Court:

Overview

[1] This decision deals with the form of order and costs following an application heard by Justice John Murphy on January 29, 2018.

[2] On September 5, 2018, Justice John Murphy released his decision allowing the application by Joseph Philip Bernard Landry, for an order to substantiate the recording of an easement "as a benefit to the registered interest" of the Applicant's property, and as "a burden to the registered interest" of the Respondents, Jeffrey G. Kidlark and Joan C. McKale.

[3] Tragically, Justice Murphy passed away before he signed the final order or made a decision on costs. As provided by Civil Procedure Rule 82.19, I have been appointed to deal with the two outstanding issues.

The Order

[4] Justice Murphy directed Mr. Landry to prepare a draft order, which was filed by Applicant's counsel, E. Anne MacDonald, on September 12, 2018. The Respondents objected to the draft order and prepared their own version for the court's consideration. On October 25, Tara Cody, Justice Murphy's judicial assistant, wrote to the parties advising that he was out of the office on medical leave until November. Ms. Cody further stated:

> In the meantime, he has asked me to advise that the Order will issue in due course in the form prepared by Ms. MacDonald with an additional provision that there will be no punitive damage award. He has considered the request to extend the deadline for costs submissions, and advises those submissions will be accepted until October 31st.
>
> [*Emphasis added*]

[5] It is clear from this letter that Justice Murphy had already decided on the form of order, and, contrary to Mr. Kidlark's submissions, there is no reason for the court to revisit the issue.

[6] The order, now revised to include the requested provision denying punitive damages, will issue in the form prepared by Ms. MacDonald.

Costs

[7] The background to this application, which includes Justice Hood's decision in *Landry v. Kidlark*, 2014 NSSC 154, was summarized by Justice Murphy in *Landry v. Kidlark*, 2018 NSSC 208:

> [3] To understand the background of this application, it is necessary to consider the related decision of Hood J. in *Landry v. Kidlark*, 2014 NSSC 154 (CanLII) (the 2014 decision), which involved essentially the same parties and property interests.
>
> [4] The 2014 decision arose from an action brought by Joseph Philip Bernard Landry, and his wife E. Anne MacDonald (together sometimes referred to as "Landry"). They alleged, among other things, breach of a view-plane easement and of a pedestrian right of way over the neighbouring property of Jeffrey G. Kidlark and his wife Joan C. McKale (together sometimes referred to as "Kidlark"). Both the plaintiffs and the defendants had purchased their properties from J. Peter MacKay and V. Carol MacKay, who were subdividing a large area on the shore of the Northumberland Strait. The plaintiffs took title through a company owned by Mr. Landry, Cottage Mechanical Services Ltd. (Cottage).
>
> [5] The Cottage lot was not on the water. Mr. Landry and Ms. MacDonald had negotiated an agreement with the MacKays (before Mr. Kidlark and Ms. McKale bought the property) for a pedestrian right of way from their lot to the Strait, along with an easement prohibiting the obstruction of their view. This agreement, between Cottage and the MacKays, was dated June 9, 2000. It was filed in the Pictou County Registry of Deeds as Document 2484, Book 1348, at pp. 433-438. The 2000 Agreement described the right of way and the view-plane easement in the following terms:
>
> > 1. MacKay hereby grants unto Cottage a pedestrian right-of-way over and along that portion of the lands described in Schedule "B" hereto annexed, between said Schedule "A" lands and the waters of the Northumberland Strait. Provided however, that the pedestrian right-of-way shall be limited to the area which is an extension of the private road in an easterly direction until it reaches the shores of the Northumberland Strait.
> >
> > 2. For the purpose of preserving and protecting the use and enjoyment by Cottage of the lands more particularly described in Schedule "A" hereto annexed, MacKay hereby grants to Cottage an easement over the lands described in paragraph 1 above, lying to the east of the lands described in Schedule "A" hereto annexed; said easement being in the form of a prohibition against construction or erection by MacKay, or those acting on behalf of MacKay, of any structure or object which would interfere with the view from the dwelling to be erected on the lands described in Schedule "A", of the waters of the Northumberland Strait. Nothing herein

> contained shall obligate MacKay to maintain said lands free and clear of vegetation or other naturally occurring things.

[6] The MacKay lands were later subdivided into several waterfront lots. The right of way was relocated by agreement dated May 30, 2002, to facilitate the sale of one of the other MacKay lots. This agreement, also between Cottage and the MacKays, was filed in the Pictou County Registry of Deeds as Document 2573, Book 1420, at pp. 752-756. After stating that the parties had agreed to amend the 2000 Agreement "by altering the location of the right-of-way thereby created for Cottage Mechanical", the 2002 agreement stated, in part:

> 1. The right-of-way created for the benefit of Cottage Mechanical pursuant to paragraph 1 of said Agreement is hereby extinguished. Paragraph 1 is hereby revoked in its entirety.
>
> 2. MacKay hereby grants unto Cottage Mechanical a pedestrian right-of-way over the lands of MacKay more particularly described in Schedule "A" hereto annexed.
>
> 3. As part of the consideration for Cottage entering into this Agreement, MacKay covenants that the lands described in Schedule "A" will always be maintained as a private right-of-way and MacKay further covenants that he will not grant similar or any other rights with respect to the schedule "A" lands to patrons of Salty Reef Driving Range or any other commercial or business enterprise. This covenant shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

[7] Several days before this agreement was concluded, Cottage had conveyed its property – known as Lot 5 – to Mr. Landry. That deed, dated May 27, 2002, was recorded almost a year later, on April 11, 2003.

[8] Landry agreed to an amendment of the view-plane easement in a further agreement, executed on July 12, 2004, and recorded as an interest under s. 47 of the *Land Registration Act* on July 14. This agreement, between the MacKays and Mr. Landry, referred to the 2000 and 2002 agreements between Cottage and the MacKays. The 2004 agreement provided, in part:

> AND WHEREAS the parties hereto have agreed to modify the Restrictive Covenant as set out in the Agreement dated June 9th, 2000, as hereinafter set out;
>
> ...
>
> 1. MacKay hereby covenants and agrees with Landry to observe and comply with the following restrictive covenant. The burden of the restrictive covenant shall run with all or any of the lands referenced in the Nova Scotia Land Registration System as PID #65147068 (Lot 4) as the servient tenement for the benefit of all or any of the lands described in Schedule "A" hereto (Lot 5) as the dominant tenement and the owner(s) and occupier(s) of such lands from time to time. The restrictive covenant

> shall be binding upon and enure to the benefit of the heirs, executors, administrators, representatives, successors in title and assigns of the parties hereto:
>
> (a) MacKay hereby covenants with Landry that MacKay shall not permit the construction, erection, or placement of any building, structure or object, temporary or permanent, or permit the planting or cultivation of any vegetation [with the exception of flower gardens having a height at full growth of not more than two (2) feet] within that portion of Lot 4 shown as Parcel VP-2 on the Plan of Survey dated June 24, 2004 attached as Schedule "C ' hereto and as more particularly described in Schedule "D" attached hereto (the "Parcel VP-2"), which in any way would have the effect of either partially or completely blocking, obstructing, impairing, or lessening the view of the Northumberland Strait from the Lot 5 Dwelling.
>
> 2. MacKay hereby grants to Landry, and all owner(s) of Lot 5 from time to time, an easement to enter over the Parcel VP-2 for the purpose of trimming naturally occurring vegetation on Parcel VP-2 to the extent that it interferes with the view of the Northumberland Strait from the Lot 5 Dwelling. This right of entry shall be subject to the owner(s) of Lot 5 giving 14 days written notice by registered mail to the owner(s) of Lot 4.
>
> 3. Landry hereby releases all remaining lands of MacKay [save and except Parcel VP-2] from the Restrictive Covenant as set out in paragraph 2 of the Agreement dated June 9th, 2000.
>
> …
>
> 6. MacKay hereby grants and confirms to Landry, as successor in title to Cottage of Lot 5, the Right of Way in its revised location, as set out in the Agreement dated May 30, 2002.

[9] Accordingly, the 2004 agreement between Mr. Landry and the MacKays created a new view-plane easement over Lot 4, and confirmed the right of way as described in the 2002 agreement. It further confirmed that Mr. Landry was successor in title to Cottage.

The 2014 decision

[10] Mr. Kidlark and Ms. McKale bought Lot 4 from the MacKays in 2006. Lot 4 was consolidated with land abutting on Mr. Landry's Lot 5, including the area containing the Landry right of way, to create a new Lot 4A. Mr. Kidlark subsequently planted trees, to which Landry objected, claiming this violated the view-plane easement. Mr. Landry and Ms. MacDonald brought an action against Mr. Kidlark and Ms. McKale, alleging interference with the easement and the right of way, and against the MacKays for negligent misrepresentation. Landry argued that it followed from the consolidation of Lot 4 and adjoining parcels into Lot 4A that the view-plane easement should be extended over the area lying between Parcel VP-2 (which was subject to the view-plane easement) and the

Landry-MacDonald property, Lot 5. Hood J. rejected this argument (paras. 93-97). She also found no basis for rectification of deeds (paras. 98-105).

[11] Hood J. rejected the Landry claim that the registration of Lot 4A under the *LRA* had improperly extinguished their easement and right of way, noting, at para. 109, that the

description of Lot 4A specifically makes it subject to … the right-of-way in favour of Lot 5 …, and the agreement of July 12, 2004… The latter document provides for the restrictive covenant (over Parcel VP-2) and also regrants the right-of-way.

[12] While the description of Lot 4A did not refer to the 2000 agreement, this was unnecessary because that agreement had been "superceded by two subsequent agreements (clauses 1 and 2) and the passage of time (clause 3)" (para. 111). As such, Hood J. stated, "the documents registered pursuant to the *Land Registration Act* affecting Lots 4A and 5 accurately reflect the benefits and burdens affecting these lots" (para. 112).

[13] There was also a dispute over access to the right of way and to Parcel VP-2, because Landry did not have a deeded right of way over a cul-de-sac located at the intersection of the various properties subdivided by the MacKays. This was a parcel that the MacKays still owned, located at the end of a private road. Landry had a right of way over the road for access to their own lot, but not over the cul-de-sac (paras. 114-123). Hood J. held that Landry had an equitable easement over that area, which was necessary to allow them to access their right of way and to clear obstructions as permitted by the view-plane agreement. Neither the MacKays nor Mr. Kidlark and Ms. McKale had grounds to defeat this equitable easement, as Hood J. explained:

> 124 As between plaintiffs [Landry] and the MacKays, I am satisfied the equity is established and the extent of it is to give the plaintiffs access over Parcel B, the cul-de-sac portion of Salty Reef Road to the pedestrian right-of-way and thence from it to Parcel VP-2 which abuts the right-of-way. The remedy is an equitable easement over Parcel B, still owned by the MacKays.
>
> 125 An equitable easement can be defeated by the purchase of the lands subject to the equitable easement by a third party without notice. That is not the case here with respect to Parcel B: the MacKays still own it. However, the equitable easement does affect Kidlark and McKale. Although they are not the owners of Parcel B, the equitable easement does result in the plaintiffs having access to their lands to exercise rights pursuant to the right-of-way and view plane agreements.

[14] Mr. Kidlark and Ms. McKale counterclaimed for, inter alia, a declaration that any easements or rights of way over their property were "null and void" (para. 131). Hood J. rejected this claim, holding that Landry had a valid view-plane easement and right of way. She rejected the assertion that the

view‑plane easement was invalid because the dominant and servient tenements were not contiguous or because it had somehow been breached by Landry (paras. 138-148). With respect to the validity of the right of way, she said:

> [149] Kidlark and McKale also say the plaintiffs' pedestrian right-of-way to the shore is invalid. They say the MacKays granted a right-of-way to Cottage on May 30, 2002, when Cottage had conveyed its interest to Philip Landry three days earlier... They say since Cottage no longer had title to the lands, the grant of right-of-way is invalid.
>
> [150] However, when the restrictive covenant over Parcel VP-2 was granted by the MacKays to Philip Landry in July 2004, they also granted and confirmed "to Landry as successor to Cottage" the right-of-way previously granted to Cottage in that May 30, 2002 agreement. Therefore, Philip Landry, as owner of Lot 5, was granted the pedestrian right-of-way.
>
> [151] No authority was cited by Kidlark and McKale to the effect that the July 12, 2004 agreement would not create a valid right-of-way. I conclude the plaintiffs have a valid right-of-way.
>
> …
>
> [154] It was the July 12, 2004 agreement which effectively granted the right-of-way to Philip Landry...

[15] Justice Hood's 2014 decision confirmed that the benefits and burdens affecting the parties' properties were reflected in the *LRA* registrations. She confirmed the validity of the view-plane easement and the right of way. The order confirmed that Landry had an equitable easement for the purpose of accessing the Kidlark-McKale lands, specifically Parcel C and Parcel VP-2, "in order to exercise the rights granted to Philip Landry" under the Landry-Mackay agreement of July 12, 2004. The order was to be recorded against the relevant parcels under the *Land Registration Act*.

The cancellation notice

[16] On May 3, 2016, Mr. Kidlark delivered a Notice pursuant to s. 63(1) of the *LRA*, requiring cancellation of a recorded interest referenced in his parcel register; namely, the 2002 Cottage Agreement, Document 2573, which, he stated, was "now wrongly and unlawfully recorded as an easement burden on "Kidlark's" "Lot 4A"." (Emphasis in original.) In the Notice he said, in reference to Document 2573:

> 8. The "Cottage Agreement", being personal in nature and not being an interest in land recognized under law, has been wrongfully and unlawfully recorded as an easement benefit to "Landry's" "Lot 5";
>
> 9. The "Cottage Agreement", being personal in nature and not being an interest in land recognized under law, has been wrongfully and unlawfully recorded as an easement burden on "Kidlark's" "Lot 4A"; and …

> 10. There is no evidence to suggest, or substantiate, that the "Cottage Agreement" is a lawfully, recordable easement burden on "Kidlark's" "Lot 4A"…
>
> [17] As such, Mr. Kidlark sought cancellation of the recording. Mr. Landry subsequently commenced this application under s 63(3) of the *LRA*, after filing a lis pendens, as required to prevent mandatory cancellation of the recording under s. 63(4)(b).

Position of the parties

The Applicant

[8] Mr. Landry says this is an exceptional case warranting an award of solicitor-client costs. His counsel submits that she billed $31,950 in fees on this file and the Applicant seeks a costs order for this amount, plus HST and disbursements. According to Mr. Landry, he had no choice but to commence this proceeding after he received the notice filed by Mr. Kidlark pursuant to s. 63(1) of the *Land Registration Act*, S.N.S. 2001, c. 6, requiring cancellation of an interest which was previously confirmed by this court in the 2014 decision. In allowing the application, Justice Murphy found that the Respondents were attempting to relitigate issues already decided in the earlier proceeding before Justice Hood. The Applicant says that even now, in a hearing on costs, Mr. Kidlark is attempting to relitigate the same issues. Mr. Landry further asserts that the Respondents dragged the matter out by filing frivolous motions to add irrelevant issues and to obtain documents from the Applicant that were already available in the court file. Finally, the Applicant says he made three formal settlement offers to the Respondents, which he says should factor into the court's costs analysis.

[9] If the court declines to award solicitor-client costs, the Applicant says he should be awarded an amount greater than half of his actual costs, along with HST and all of his disbursements.

The Respondents

[10] Mr. Kidlark submits that there should be no costs award against the Respondents. Instead, he says, costs should be awarded against the Applicant. According to Mr. Kidlark, this application should never have been filed. He describes it as "completely unnecessary, vexatious, and irresponsible".

[11] Mr. Kidlark says the cancellation under s. 63 of the *LRA* was an administrative process, and that the Applicant should have let it proceed through to

the Registrar General rather than bringing a chambers application. Mr. Kidlark further submits that Mr. Landry instigated the cancellation request by "provocatively" recording the May 30, 2002, agreement as an "Easement/Right of Way Benefit" to his property, when Justice Hood had concluded that "[i]t was the July 12, 2004 agreement which effectively granted the right-of-way to Philip Landry … and takes effect from July 12, 2004": 2014 decision, at para. 154.

[12] Mr. Kidlark also says the Respondents had no choice but to respond to the application because they had to defend against the Applicant's claim for punitive damages, which was unsuccessful. He denies that he dragged out the application by bringing frivolous motions, arguing that the motions were necessary due to alleged misrepresentations and omissions by the Applicant and his counsel. Mr. Kidlark submits that the court should grant costs to the Respondents in the amount of $4,000 – the maximum amount under Tariff C for a one-half day chambers application ($1,000), multiplied by four.

[13] In the alternative, Mr. Kidlark submits that Ms. MacDonald is, in effect, a party to the application, and this should be reflected in any costs awarded. As the Applicant's wife, Mr. Kidlark says, Ms. MacDonald has spousal interest in Mr. Landry's property, and any fees paid to her will benefit him as well. Mr. Kidlark cites *Wall v. Horn Abbot*, 2008 NSSC 4, at para. 12, for the proposition that a party "should not be allowed costs in excess of the party's liability to his or her own solicitor". He says that because the Applicant's liability to Ms. MacDonald is not at arms length, there is no way to determine what that liability is, or how much will be "kicked back" to Mr. Landry, in one form or another. It follows, he submits, that any costs award to the Applicant would represent a form of double indemnification. He says the court should therefore treat Ms. MacDonald as a self-represented litigant for costs purposes.

Analysis

[14] Costs are governed by Civil Procedure Rule 77. Rule 77.01 describes the scope of the Rule:

> 77.01 (1) The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;

> (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

[15] Rule 77.02(1) provides that a judge may "make any order about costs as the judge is satisfied will do justice between the parties." Rule 77.03(2) deals with solicitor-client costs:

> 77.03 (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

[16] In *Young v. Young*, [1993] S.C.J. No. 112, McLachlin J. (as she then was) held that solicitor-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": para. 251.

[17] In *Winters v. Legal Services Society*, [1999] S.C.J. No 49, Binnie J. described the test for solicitor-client costs as follows:

> 79 The appellant seeks his costs in this Court and in the courts below on a solicitor-client basis. It is well settled that solicitor-client costs are unusual. They should not be awarded unless there is something in the behaviour of the losing party that takes the case outside the ordinary. See K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 11.860. For example, solicitor-client costs were awarded when this Court was of the opinion that the unsuccessful party should not have pursued the litigation or the unsuccessful party had been unreasonable in some other way. See *Palachik v. Kiss*, [1983] 1 S.C.R. 623. …

[18] The Nova Scotia Court of Appeal considered solicitor-client costs in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47:

> [458] It has long been settled law in this province that an award of solicitor-client costs is reserved for cases said to be "rare and exceptional". For example, in *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43 (C.A.), Pugsley, J.A. said at p. 55:
>
> > [94] While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (*P.A. Wournell Contracting Ltd. et al. v. Allen* (1980) 37 N.S.R. (2d) 125).

> See as well, *Campbell v. Lienaux et al.*, 2001 NSSC 44, aff'd on appeal 2002 NSCA 104; *Young v. Young*, [1993] 4 S.C.R. 3; *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160; and *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, 2010 NSCA 17.

[19] Solicitor-client costs may be justified "where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of the litigation": *Standard Life Assurance Co. v. Elliott*, [2007] O.J. No. 2031 (Ont. S.C.J.), at para. 9. Even where one party has acted in a reprehensible manner, however, this does not mean that solicitor-client costs will always follow: *Metropolitan Authority v. Brown*, 1996 NSCA 91, at p. 18.

[20] Putting aside the relationship between Mr. Landry and Ms. MacDonald for a moment, I find that the Applicant was the successful party, and that the Respondents' conduct meets the test for solicitor-client costs. Mr. Kidlark served the Applicant with the notice of cancellation on the basis that there was no benefit conferred on any property by the 2002 agreement, a point which Justice Murphy held had been settled by Justice Hood's 2018 decision, at para. 38. When Mr. Landry received the notice, he was forced to file this application to ensure that the Registrar General did not strike the recorded interest from the parcel register. Mr. Kidlark's argument that he did not expect the Applicant to litigate the matter and that Mr. Landry only filed this application to punish the Respondents is not convincing. It is also undermined by the contents of the notice of cancellation which Mr. Kidlark prepared and served upon Mr. Landry. The notice states at p. 2:

> Joseph Philip Bernard Landry,
>
> you are hereby Served Notice
>
> (both personally and as the Recognized Agent for All Business Services Limited)
>
> pursuant to Section 63(1) of the Land Registration Act, which states, in part,
>
> > "The registered owner of a parcel may send a notice requiring cancellation of a recorded interest … referenced in the parcel register by serving notice on the holder of that interest … to take proceedings in the court to substantiate the interest …",
>
> that you are to:
>
> > Take proceedings in court to substantiate your interest in the "*Cottage Agreement*" which was wrongly and unlawfully recorded in the Pictou County Registry of Deeds on June 04, 2002 as Document 2573 in Book 1420 at Page 752 and is now wrongly and unlawfully recorded as an easement burden on "*Kidlark's*" "*Lot 4A*".

[*Emphasis added*]

[21] Mr. Kidlark acknowledged before Justice Murphy that cancellation of the recorded interest would not change the fact that the Applicant has a valid right of way over the Respondents' property. As Justice Murphy wrote at para. 21 of his decision:

> [21] To be clear, the existence of the relevant property interests is not in dispute. Both the view-plane easement and the right of way are valid interests. That was decided by Justice Hood. This proceeding is only concerned with the recording of the 2002 interest under the *Land Registration Act*. When this was put to him during the hearing, Mr. Kidlark conceded that this was the case, saying that he only wanted the recording cancelled to "clean up" his parcel register and to protect the "integrity" of the *Land Registration Act*. In other words, Mr. Kidlark concedes that there is no live dispute of any substance here.
>
> [*Emphasis added*]

[22] Justice Murphy found that Mr. Kidlark was attempting to relitigate an issue that had already been decided by Justice Hood:

> [38] Mr. Kidlark maintains that the 2002 agreement could not amend the 2000 agreement because the grantee of the right of way, Cottage, had transferred the title to the Applicant several days before the agreement was executed. As a result, he says, there was no benefit conferred on any property by the 2002 agreement. Counsel for Mr. Landry relies on a body of law dealing with the effective date of a deed, summarized by MacIntosh at §5.5A of the *Nova Scotia Real Property Practice Manual*. In my view, this aspect of the 2002 and 2004 agreements was settled by Justice Hood. As counsel for Landry submits, Justice Hood held that the 2004 agreement incorporated the 2002 agreement, in which the MacKays acknowledged Landry as a successor to Cottage. She confirmed and regranted the right of way as described in the 2002 agreement. She rejected Mr. Kidlark's claim on essentially the same grounds he has advanced in this proceeding. I conclude that Justice Hood's decision disposed of this issue.
>
> [39] Mr. Kidlark maintains that it would make his parcel register simpler and easier to understand if the 2002 agreement were struck off. I do not see how this is the case. The 2004 agreement states that "MacKay hereby grants and confirms to Landry, as successor in title to Cottage of Lot 5, the Right of Way in its revised location, as set out in the Agreement dated May 30, 2002." The 2004 Agreement does not contain a description of the area subject to the right of way; that is found in Schedule A of the 2002 agreement. As such, to remove the 2002 agreement from the parcel register would be as likely to confuse as to clarify the interests involved.
>
> [*Emphasis added*]

[23] Justice Murphy concluded that the 2002 agreement was appropriately recorded on the parcel register:

> [43] In conclusion, I am satisfied that the recording of document 2573 should be substantiated. The interest is exempt from cancellation by virtue of s. 63(3)(b). Even if that were not the case, I would be satisfied that the respondent is bound by the easement, as a successor in title to the MacKays, and that the 2002 agreement is appropriately on the parcel register as a description of the right of way confirmed and regranted in the 2004 agreement.

[24] Not only did Mr. Kidlark attempt to relitigate issues before Justice Murphy that had been decided by Justice Hood, but he has gone on to advance the very same arguments before me in this hearing. He has continued to make unsubstantiated allegations of misrepresentation and fraudulent misrepresentation against Mr. Landry and Ms. MacDonald. Disrespect for previous court decisions cannot be condoned. Mr. Kidlark's misuse of the court's time and unwarranted allegations against the Applicant and his counsel must be reflected in costs.

[25] All that said, a court awarding solicitor-client costs does not simply rubber stamp counsel's bill of costs. The fees charged must be reasonable. Ms. MacDonald has attached a seven-page bill of costs as Schedule "A" to the Applicant's brief but it is not an exhibit to her affidavit.

[26] In Schedule "A", Ms. MacDonald states that she spent 142 hours working on the file, at a rate of $225 per hour, for a total of $31,950 in fees. Evidentiary issues aside, and putting aside the issue of Ms. MacDonald's status as Mr. Landry's spouse, I will not award costs in that amount. Having reviewed the file, I find that this sum is far too high. Ms. MacDonald has billed significantly more time than is justified by the complexity of the issues and volume of the work produced.

[27] The first red flag with her bill of costs is that every billing entry is for a half hour or a full hour increment – for instance 0.5, 1.0, or 1.5 hours. This raises concerns. Those concerns increase when reviewing the individual entries. Here are a few examples:

- On June 29, 2016, she billed 1.5 hours for "Attendance upon Joseph Philip Landry for execution of Affidavit". This is in addition to two hours billed for actually preparing the affidavit. Mr. Landry is Ms. MacDonald's husband, and they both reside at the same property. The execution process should not have taken 1.5 hours;

- On April 28, 2017, Ms. MacDonald billed one hour for "Preparation of Offer to Settle". She billed an hour on each of January 19, 2018, and January 26, 2018, for the same task. A review of the three offers, however, reveals that they were essentially identical, save for the date;
- On April 28, 2017, she billed one hour for "Forwarding Offer to Settle to Respondents". On each of January 19, 2018, and January 26, 2018, she billed one half-hour for the same task. Why would "forwarding an offer" take so long?;
- On September 5, 2018, Ms. MacDonald billed five hours for "Receipt and review of Decision following Hearing". Justice Murphy's decision was 15 pages in length, and should have taken an hour to review, at most. Reviewing three pages per hour is not reasonable.

[28] Entries of this nature make it impossible to rely on Ms. MacDonald's bill of costs.

[29] In addition, Ms. MacDonald billed for tasks that required no legal skill at the same hourly rate of $225 per hour. For example:

- On April 6, 2017, she billed one hour for "Requesting copy of transcript for Decision of Justice Warner at Chambers"; and
- On January 13, 2017, she billed one hour for "Forwarding Documents to UPS Store to be bound and picking up documents".

[30] If Ms. MacDonald wishes to do these tasks herself, rather than delegating them to staff, that is her choice. However, her clients should not be billed $225 per hour for her to do them, nor should an opposing party be forced to pay higher costs for that reason.

[31] As to the quality of the legal work, this was not a complicated application. According to Justice Murphy's decision, Ms. MacDonald's submissions before him, including an argument that the recorded interest was actually a registered interest, did little to advance the issues. As Justice Murphy stated:

> [31] Counsel for Mr. Landry submitted that a recorded interest does not convey title or an interest in the property, but conveys a money interest. She insisted that a right of way is a registered interest. I cannot agree with this interpretation. The 2002 agreement is not the type of interest identified in s. 17(1) as being capable of registration. It appears on the respective parcel registers under the headings "Benefits to the Registered Interests" and "Burdens on the

> Registered Interests." The only entries on the parcel registers under the heading of "Registered Interests" are the fee simple interests. While the registers do provide a "registration date" for the benefits and burdens attaching to the parcel, it does not follow that these are "registered" within the meaning of ss. 17(1) and 63(3)(a). The exception under s. 63(3)(a), that cancellation does not apply to a registered interest, is accordingly not available.
>
> [32] As to the exception for consent of the registered owner under s. 63(3)(b), the 2002 agreement was agreed to by the then-owners of the servient tenement, the MacKays. It appeared as a burden on the property when the parcel was migrated to the LRA system in 2004. Mr. Kidlark and Ms. McKale had notice of it when they bought the property in 2006. The 2004 agreement further confirmed that Mr. Landry was successor in title to Cottage. Having purchased the property with notice of the interests in question, it appears to me that Kidlark – being the registered owner of the servient tenement – must be taken to have consented to the interest. As such, s. 63 does not apply.
>
> [33] Accordingly, I conclude that Mr. Kidlark consented to the interests described in the 2002 agreement when he and Ms. McKale bought their property. As such, the interests are immune from cancellation, and the application to substantiate the interest is allowed.

[32] Taking everything into consideration, a reasonable solicitor's bill of costs for this application, inclusive of HST, would be no more than $10,000.

Ms. MacDonald's relationship with Mr. Landry

[33] Mr. Kidlark submits that Ms. MacDonald, as Mr. Landry's spouse, should be treated as a self-represented litigant for costs purposes. Mr. Kidlark has not provided, nor has the court found, any cases in Nova Scotia where a court has deemed a solicitor acting for his or her spouse to be a party for the purposes of assessing costs, or otherwise reduced costs on the basis of the spousal relationship. As Associate Chief Justice Smith noted in *Brogan v. Bank of Montreal*, 2013 NSSC 76:

> [42] <u>While one may question the advisability or wisdom of acting for a family member (particularly in a contested proceeding), there is no blanket prohibition against such a practice.</u> Rather, the court analyzes the nature of the relationship and whether the relationship will interfere with the lawyer's duty to provide objective, disinterested professional advice. The court will also consider whether the lawyer has a personal involvement or interest in the proceeding. The concern is the lawyer's ability to remain objective and independent when advising the client and dealing with the other parties and the court.
>
> [*Emphasis added*]

[34] The fact that the solicitor has a personal interest in a proceeding is not necessarily a problem either, as long as that interest coincides with his or her client's interest, and the client is aware of the solicitor's interest: *Triple 3 Holdings Inc. v. Jan*, [2006] O.J. No. 3536 (Ont. C.A.), at para. 22.

[35] Accordingly, there is no blanket prohibition against lawyers acting for family members, even where the lawyer has a personal interest in the proceeding. I have seen no authority for the proposition that the court, in awarding costs in such proceedings, should look behind the solicitor-client relationship to determine whether the client has actually paid the lawyer's bill, or whether it is likely that a portion of the costs award will be "kicked back" in some form to the lawyer by the client (to use Mr. Kidlark's phrase).

Mr. Kidlark's behaviour

[36] Rule 77 authorizes me to make any order about costs that will do justice between the parties. I am satisfied that it is just in these circumstances to award costs on a solicitor-client basis against the Respondents. But for Mr. Kidlark's obstinacy, the Applicant would not have been forced to file this application to reassert an interest already confirmed by this court. Mr. Kidlark also prolonged the proceeding unnecessarily by bringing frivolous motions, including a motion before Justice Warner on April 17, 2017, to add several more issues. After reviewing what he described as a "an amazing, incredible quantum of paperwork" filed by the parties, Justice Warner advised Mr. Kidlark that, in the court's view, the issues he was attempting to add had already decided by Justice Hood. Mr. Kidlark's conduct on behalf of the Respondents is deserving of rebuke, and a substantial costs award will hopefully dissuade him from further attempts to relitigate these issues.

Settlement offers

[37] As to the three settlement offers to which Ms. MacDonald refers, Rule 10.03 provides that a judge who determines costs may consider a formal offer of settlement. Rule 77.07(2) states that a judge considering a request that an amount be added to or subtracted from tariff costs may consider a number of factors, including "a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted". In this case, I have not relied on the tariffs. In addition, although both parties refer to the three offers in this case as formal offers of settlement, that is inaccurate. Nova Scotia Civil Procedure Rule 10 deals with formal offers to settle. Rule 10.05(4) states:

> (4) The offer must include terms that would settle all claims in the proceeding between the party making the offer and the party to whom it is made, and the term that would settle costs must provide for one of the following:
>
> (a) payment on acceptance of an amount stated in the offer;
>
> (b) payment of an amount for costs to be determined by a judge;
>
> (c) an option for the other party to choose between a stated amount for costs or determination by a judge.
>
> [*Emphasis added*]

[38] Each of the offers prepared by Ms. MacDonald provides that the Respondents "will pay to the Applicant one-half of his costs plus reasonable disbursements and HST to the date of acceptance of this settlement." There is no amount stated. On each occasion, after forwarding the offer to the Respondents, Ms. MacDonald followed up with Mr. Kidlark as to the specific amount the Applicant was prepared to accept. The lack of an amount stated in the offers means that they are not formal offers to settle under Rule 10. See, for example, *National Bank Financial Ltd. v. Potter*, 2014 NSSC 264, at paras. 148-152.

Disbursements

[39] The Applicant claims $3,054.26 in disbursements, but has offered no supporting evidence. The Applicant's list of disbursements includes the cost of airfare to fly Mr. Landry back and forth from a job in Ontario so that he could attend the hearings on June 1, 2017, and January 29, 2018. The total amount claimed for airfare is $1,195.68.

[40] Necessary and reasonable disbursements are recoverable, but they must be proven. In *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461, Justice Murphy adopted the following statement of the law at para. 48:

> Recovery of disbursements is limited to expenses incurred and normally paid. The strict practice is to file an affidavit of payment of disbursements before recovery.

[41] Ms. MacDonald should be aware of the longstanding practice of filing an affidavit of payment of disbursements as mentioned by Justice Murphy.

[42] Although I considered denying all of the Applicant's disbursements, I will give Ms. MacDonald 30 days from the release of this decision to file an affidavit of disbursements. I would note, however, that no award will be made to cover the

cost of the Applicant's airfare unless she provides me with authority to support her position that expenses incurred to enable a successful party to attend at a hearing are recoverable. I have already heard from the Respondents with respect to the disbursements claimed by the Applicant and there is no need for them to repeat their submissions. However, they may make submissions within 15 days of receipt of the Applicant's materials on any new points arising from that evidence.

Conclusion

[43] I award $10,000 in costs to the Applicant. I will give Applicant's counsel 30 days from the date of this decision to provide the court with an affidavit of disbursements.

[44] The Respondents will have 15 days from that date to file a response, if any. Such response should be no more than five (5) pages.

Arnold, J.