

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Grant v. Halifax Regional Water Commission*, 2019 NSSC 281

**Date:** 20190917

**Docket:** Hfx No. 484489

**Registry:** Halifax

**Between:**

Kirby Eileen Grant

Applicant

v.

Halifax Regional Water Commission

Respondent

**DECISION**

**Judge:** The Honourable Justice James L. Chipman

**Heard:** September 5, 2019, in Halifax, Nova Scotia

**Written Decision:** September 17, 2019

**Counsel:** Ian M. Gray, for the Applicant  
Richard W. Norman, for the Respondent

By the Court:

## OVERVIEW

[1] In 2000 Ms. Grant purchased a Banook lakefront home on 5 Hume Street in Dartmouth. Nine years later she paid \$25,000.00 for 7 Hume Street, a long, narrow vacant lot next door. At the time she knew 7 Hume Street, because of its small size, to be undevelopable.

[2] In 2017 Ms. Grant decided to sell 7 Hume Street. By this time, owing to changes in the land use by-law permitting undersized lots to be developed, Ms. Grant considered 7 Hume Street developable. A potential buyer agreed to pay Ms. Grant \$140,000.00 for the lot on the condition that he be permitted to build on the property. After obtaining a development permit in 2018, the prospective buyer was advised by the Halifax Regional Water Commission (Halifax Water) that they would not consent to the development of the lot. This, owing to the presence of an 8” diameter storm water pipe running the length of 7 Hume Street. The utility took the position that it has an unrecorded 6 metre easement over the area of the pipe. Unable to obtain the necessary building permit, the prospective buyer withdrew from the Agreement of Purchase and Sale and Ms. Grant failed to sell the property.

## COURT FILINGS

[3] By Notice of Application in Court filed January 23, 2019, Ms. Grant seeks damages “arising from the continual trespass by the Respondent in respect to the presence of a stormwater pipe on the Applicant’s property, located at 7 Hume Street, Dartmouth, Nova Scotia”. By Notice of Contest filed April 5, 2019, Halifax Water says the application should be dismissed for a number of grounds, including:

6. The Respondent says the portion of the Lands containing the drainage pipe has been utilized openly and continuously by the Respondent in excess of twenty (20) years and, as such, constitutes a prescriptive easement in favour of the Respondent pursuant to section 32 of the *Real Property Limitations Act*, RSNS c. 258 and an easement that is being used and enjoyed pursuant to section 73(1)(e) of the *Land Registration Act*, SNS 2001 c. 6.

On April 5, 2019 Halifax Water also filed a Notice of Respondent’s Claim.

[4] On April 12, 2019 Halifax Water filed a Form 19 with the purpose to record a Certificate of *Lis Pendens* against a parcel (PID 00209668; i.e., 7 Hume Street) registered under the *Land Registration Act*, SNS 2001 c. 6 (*LRA*).

[5] On April 17, 2019 Ms. Grant filed a Notice of Contest of Respondent's Claim stating Halifax Water's claim should be dismissed because:

1. The Applicant denies the existence of a [sic, an] easement, public or otherwise, for stormwater drainage by virtue of the Applicant's knowledge, or the open and continuous use of the stormwater drainage easement at 7 Hume Street by public utility in excess of 20 years.
2. The Applicant denies the existence of any demand made by Halifax Regional Water Commission with respect to the granting or acknowledgement of a public easement.
3. The Applicant is unaware of any express pipe or service agreement and is unaware of any prescriptive easement on title, or by use, or by any other means, and accordingly denies the existence of any recorded or implied easement regarding the presence of the stormwater drainage pipe.
4. In the alternative, the Applicant says that the actions of Halifax Regional Water Commission, and its claim for a public easement constitute *de facto* expropriation and should be treated accordingly.

## **EVIDENCE**

[6] Ms. Grant relied on and was cross-examined on her affidavits filed May 2 and June 21, 2019. Halifax Water relied on the affidavit of their manager of engineering approvals, Kevin Gray, filed May 14, 2019. Mr. Gray was not cross-examined. Halifax Water also relied on the affidavit of Keith Clattenburg sworn June 10, 2019 and filed two weeks later. Mr. Clattenburg currently resides at 8 Hume Street and the 67 year old deposed, "I have lived in the neighbourhood all my life". Mr. Clattenburg was cross-examined.

### **Kirby Eileen Grant**

[7] I found Ms. Grant to be a most forthright and reliable witness. Called to the Nova Scotia bar in 1979, Ms. Grant is currently a non-practicing member. She last practiced as a lawyer for the Halifax Regional Municipality (HRM) between 2006 and 2016. During the last three years her area of practice was real property.

[8] Asked when she first saw the pipe in question, Ms. Grant said it was while boating on Lake Banook in either the summer of 2001 or 2002. She (correctly) assumed it to be a storm water pipe because she knew of the presence of the catch

basin on Hume Street. Indeed, she recalled over the years on a few occasions clearing debris away from the catch basin. Ms. Grant added that she knew the pipe ran the length of the property, recalling her cat was “scared into the pipe” in June of 2006 or 2007.

[9] Ms. Grant provided background surrounding her purchase of 7 Hume Street in 2009 and her attempted sale years later. While she owned the property she said she used it as “an extension of my yard”, adding that she kept her boat on a wooden cradle on top of the pipe at the end of the property by Lake Banook.

[10] As of 2009, Ms. Grant agreed that Halifax Water had responsibility over storm water infrastructure. Prior to purchasing 7 Hume Street, she never contacted Halifax Water or HRM about the pipe. Over the years she has not been contacted by the utility concerning the pipe. Ms. Grant never interfered with the pipe. She agreed Halifax Water has not attempted to hide the pipe.

[11] Ms. Grant agreed that Hume Street was paved by HRM and is plowed by HRM snow removal services. She had no evidence to suggest Hume Street is private other than, “it fits some of the criteria, it is a narrow, older road”.

[12] Ms. Grant attended a May, 2018 meeting involving Halifax Water and HRM personnel concerning the 7 Hume Street building permit refusal. She recalled Halifax Water’s Kevin Gray and Kendra MacKinnon in attendance along with Halifax Water legal counsel, James Spurr, albeit, “he left half way through”. During the meeting Ms. Grant said various options were discussed with respect to the pipe; however, she was left with the impression that “none were feasible”.

[13] In Ms. Grant’s second affidavit (para. 6) she attaches “...a copy of a subdivision approval survey plan done for the subdivision of 3 Hume Street property, namely, lots AP-1 and AP-2. It shows all buildings and appurtenances on the northeast or lake side of Hume Street in existence at the time of survey, and delineates Hume Street and part of Lakeview Point Road. It gives some details of two of the lots on the southeast side of Hume Street and two lots on Lakeview Point Road....”.

[14] In the next para. of her affidavit she says: “in examining exhibit 1 [the 3 Hume Street sub-division approval plan], I note that it is dated October 9, 1984 and there is no indication, or marking, of a pipe on the property or a catch basin in the street right of way”.

[15] On cross-examination Ms. Grant agreed she had no input in obtaining the survey and that it represents a subdivision plan for semi-detached buildings at 3 and 5 Hume Street. She agreed the plan was used to obtain subdivision approval of 3 Hume Street. Ms. Grant acknowledged the survey plan did not pertain to 7 Hume Street and that she has “no idea” if the surveyor would have set foot on this lot.

**Keith Clattenburg**

[16] Mr. Clattenburg proved to be a most unreliable witness, lacking in credibility. He was a very reluctant witness, expressing his view (even before he completed his oath) that he did not want to be in Court. Mr. Clattenburg added that he was “frustrated” with the process and wondered why he had to say anything. Many of his answers were qualified with “I’m not sure” and when pressed on (important) dates, “it could have been later or earlier”.

[17] Mr. Clattenburg was asked about para. 9 of his affidavit:

9. I recall that in the 1970s or early 1980s, Bruce Higgins and Carl Wolff had a discussion about water saturating the ground near the shed. I spoke with both men and was aware of this discussion. I knew that the saturation of the ground came from the Pipe.

[18] In the next para. of his affidavit Mr. Clattenburg deposes a neighbour dug around the pipe “in the 1970s or the early 1980s but not later than 1985”; however, when asked specifics he did not know on what property or if he touched the pipe. Later he allowed that he had no recollection of anyone fixing a broken pipe.

[19] In argument it was pointed out that Mr. Clattenburg’s para. 5 was not challenged on cross-examination. This reads:

5. I have observed the storm-water drain pipe on 7 Hume (the “Pipe”) that runs from Hume Street down to the lake. I have known about its existence for about 40 years.

[20] By way of response, Ms. Grant argued that based on his overall evidence, Mr. Clattenburg should not be relied upon for anything he said in his affidavit.

[21] Having considered the totality of Mr. Clattenburg’s evidence, I strongly agree with the submissions of Ms. Grant’s counsel. On balance, the witness was so uncertain about dates and events, I cannot ascribe any weight to his affidavit, even though it was not challenged on a line by line basis. Indeed, given the overall tenor

of the evidence, such an approach was not required. In short, the Court is loathe to accept anything proffered by Mr. Clattenburg and I have therefore disregarded both his written and oral evidence. I am not persuaded to accept anything coming from the completely unreliable and incredible witness.

### **Kevin Gray**

[22] Mr. Gray's unchallenged affidavit consists of 25 paras. and 8 exhibits. At para. 6, Mr. Gray succinctly describes 7 Hume Street, referring to it as the "Property":

The Property is a narrow strip of land with road frontage on Hume Street. It also has water frontage on Lake Banook. Within the Hume Street right-of-way, immediately in front of the Property, is a catch basin. The catch basin drains stormwater from Hume Street. Stormwater enters the catch basin and is discharged by the Pipe into Lake Banook. The Property is approximately 25 feet wide. Halifax Regional Municipality ("HRM") drains stormwater, collected within the right-of-way, to the catch basin owned by Halifax Regional Water Commission. The stormwater collected in the catch basin is returned to the natural environment, Lake Banook, via the Pipe.

[23] At the conclusion of his affidavit Mr. Gray includes Exhibit H, a true copy of a 41-page stormwater infrastructure agreement between Halifax Water and HRM. His unchallenged affidavit also contains evidence regarding:

- (a) the placement and structure of the pipe and catch basin;
- (b) the contents of former City of Dartmouth employee, D. Keeping's, field notes about 7 Hume Street from 1993. These documents are recovered from an archive and are over 20 years old. They indicate that the pipe was present in 1993;
- (c) what would be needed to move the pipe; and
- (d) design specifications for stormwater pipes.

## **POSITIONS OF THE PARTIES**

### **Applicant**

[24] Ms. Grant says Halifax Water never registered their purported pipe easement. Accordingly, 7 Hume Street "appeared unencumbered to any diligent

solicitor at the time of purchase”. She takes the position that Halifax Water was obliged to register and record the easement.

[25] In the alternative, Ms. Grant argues that if the Court accepts that Halifax Water is entitled to the easement it claims (in all, more than two thirds of the 5,200 square foot property), that this amounts to expropriation and compensation must follow.

### **Respondent**

[26] Halifax Water submits that the evidence demonstrates use of 7 Hume Street by Halifax Water beginning in the late 1970’s or early 1980’s, but no later than 1985. Accordingly, they submit the 20-year statutory period prescribed by the *Real Property Limitations Act*, 1989 R.S.N.S., c. 258 (“*RPLA*”) has been met. Halifax Water also points out that they are within the statutory requirement under the *LRA* as the *lis pendens* was registered within the 10-year statutory limitation period. It is further submitted that Halifax Water has met all requirements under the common law for a prescriptive easement granting it access to the pipe.

[27] Halifax Water argues that the easement must extend to a width of 6 metres, pursuant to s. 2.1 of Schedule A of the HRM by-law L-400, which reads:

#### Easements

- Easements shall be provided for all swales which in the opinion of the Engineer require such legal conveyances. Generally, easements will be required when a significant number of lots depend on the swale.
- Public easements shall be provided for all catchbasins and associated stormwater pipes constructed in conformance with the HRM and Halifax Water standards.
- A minimum easement width of 6 metres is required for public easements as per HRM and Halifax Water requirements.
- A minimum easement width of 4.5 metres is required for private easements.

### **ANALYSIS AND DISPOSITION**

[28] Halifax Water’s assertion that it first used the property no later than 1985 is entirely based on Mr. Clattenburg’s evidence. For the reasons outlined above, I cannot accept on a balance of probabilities that the pipe was in the ground on the property as at 1985. In this regard, Mr. Clattenburg’s evidence is of no value. Indeed, when I consider all of the acceptable evidence, I am left to find that the

pipe was in the ground as at October 25, 1993, the date D. Keeping recorded in his notes. There is simply no evidence that the pipe was there on an earlier date.

[29] I have determined from the evidence on a balance of probabilities that Halifax Water has had an approximate 8” diameter PVC stormwater drainage pipe running the length (150’) of 7 Hume Street. The pipe has been on the property since it was first noted by D. Keeping in 1993. I further find that this same pipe was observed by Ms. Grant in the summer of 2001 or 2002. Although much of the pipe is buried, I have determined that Halifax Water did not conceal the pipe; indeed, it was plain to Ms. Grant that the pipe was used for draining stormwater into Lake Banook from the moment she first saw the end of the pipe while on her boat in the lake. Halifax Water has openly and notoriously used the pipe at 7 Hume Street from October 25, 1993 until the present. When Ms. Grant bought the vacant lot on April 30, 2009, Halifax Water had used the property for 15.5 years.

[30] Given the above finding, the 20-year statutory period prescribed by s. 32 of the *RPLA* has not been made out. That is to say, on the evidence, Halifax Water falls 4.5 years short of the required 20 year prescriptive period.

[31] Given my finding that a prescriptive easement under s. 74(1) of the *LRA* is not made out, I am of the view that a prescriptive easement should be granted under ss. 74(2) and 75 of the *LRA* instead. In this regard, the *LRA* allows owners of an adjacent parcel of land to claim an easement by prescription of the land of their neighbours. The term “owner” in the *LRA* includes agents of the owner. *LRA* s. 74 reads:

Adverse possession and prescription

74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.

(2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless

- (a) an order of the court confirming the interest;
- (b) a certificate of *lis pendens* certifying that an action has been commenced to confirm the interest;
- (c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the Crown Lands Act; or

(d) the agreement of the registered owner confirming the interest, has been registered or recorded before that time.

[32] Having regard to s. 74(2), I conclude that Halifax Water is within the statutory requirement. This is due to the fact that the certificate of *lis pendens* with respect to 7 Hume Street was registered on April 12, 2019. It has therefore been claimed by Halifax Water within ten years of Ms. Grant registering the parcel pursuant to the *LRA*. In this regard, the evidence demonstrates that 7 Hume Street was registered under the *LRA* on May 13, 2009. Accordingly, Halifax Water asserted its interest just within the 10-year statutory limitation period.

[33] Given the above, I am of the further view that the utility meets the requirements for a prescriptive easement under s. 75 of the *LRA*. The *LRA* allows for a prescriptive easement by the owner of an adjacent parcel after the parcel is registered:

Limit on land acquired

75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

(1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.

(2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act. 2001, c. 6, s. 75; 2002, c. 19, s. 33.

The *LRA* also provides a definition of an “owner”:

Interpretation

3 (1) In this Act,

...

(1) “owner” includes an agent empowered to act for an owner;

[34] The *Halifax Regional Municipality Charter*, 2008, c. 39 vests ownership of municipal streets in HRM:

3 (bu) “street” means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, except as otherwise defined in this Act;

...

317 In this Part, “street” means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, but does not include bridges vested in the Halifax - Dartmouth Bridge Commission and streets vested in Her Majesty in right of the Province.

318 (1) All streets in the Municipality are vested absolutely in the Municipality.

(2) In so far as is consistent with their use by the public, the Council has full control over the streets in the Municipality.

(3) No road, or allowance for a road, becomes a street until the Council formally accepts the road or allowance, or the road or allowance is vested in the Municipality according to law.

(4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street.

Hume Street is a public street, and is therefore owned by HRM.

[35] For the purposes of owning and maintaining the pipe, Halifax Water is an agent of HRM. According to the *Halifax Regional Water Commission Act*, HRM owns Halifax Water, as the *Act* states:

Owner of business

6 The Regional Municipality is the owner of the business of Commission for all purposes, including surplus payments as provided for herein and entitlement to the assets of the Commission in the event of dissolution or winding down of the Commission.

[36] Exhibit “H” of Kevin Gray’s affidavit contains an agreement between HRM and Halifax Water with respect to the management and ownership of storm-water infrastructure, including the pipe. This agreement establishes that Halifax Water is HRM’s agent with respect to ownership and maintenance of the pipe. As HRM’s agent, Halifax Water is therefore capable of claiming an interest in the land by way of prescription as an agent of an “owner” of an adjacent parcel under the *LRA*.

[37] The evidence confirms that Halifax Water is an agent of an owner of an adjacent parcel of land for the purposes of the *LRA* and therefore able to claim an easement pursuant to s. 75(1). The property is an adjacent parcel to Hume Street; Exhibit “D” to the affidavit of Kevin Gray shows that HRM has a fee simple interest in Hume Street.

[38] Under s. 75(1) the easement must be limited to 20 percent of the property. Since the property is twenty five feet wide along both Lake Banook and Hume Street, the easement shall be granted for five feet across the width of the property over the pipe. This easement length shall stretch the entire one hundred and fifty foot length of the property.

[39] In the result, Halifax Water shall have a 5' easement over the existing pipe on 7 Hume Street. This figure represents twenty percent of the lot; i.e., the overall easement shall be 5' x 150' of the 25'x150' lot, and therefore in keeping with s. 75(1) of the *LRA*.

[40] Given the mixed success of this application there shall be no costs awarded.

Chipman, J.