SUPREME COURT OF NOVA SCOTIA
Citation: *St. Mary's (Municipality) v Cook*, 2020 NSSC 258

Date: 2020-10-05
Docket: SAT No. 470771
Registry: Truro

Between:

Municipality of the District of St. Mary's

Applicant

v.

Buddy Cook, Cindy Mildred Cook, Robert Leo Vernon Cook, *Expropriation Act*, Attorney General of Nova Scotia

Respondent

Judge:	The Honourable Justice John A. Keith
Final Written Submissions:	May 21, 2020
Counsel:	Peter Rogers, Q.C., counsel for the Applicant Municipality of the District of St. Mary's
	Robert Pineo, counsel for the Defendants Buddy Cook, Cindy Mildred Cook and Robert Leo Vernon Cook
	Defendant Attorney General of Nova Scotia not participating

By the Court:

BACKGROUND AND ISSUE

[1] This proceeding relates to a Laneway in the Village of Sherbrooke, Nova Scotia.

[2] By way of background, and as indicated in my decision (2019 NSSC 374), this Laneway:

1. connects the main highway which runs through the Village of Sherbrooke to Sherbrooke Lake;

2. was historically used to create, access, and maintain the public water supply system located on the shores of Sherbrooke Lake;

3. was also used by certain private landowners whose lands abut the Laneway; and,

4. served as a physical boundary line for the abutting landowners and is actually identified as a boundary line in the metes and bounds description on the deeds of many abutting landowners.

[3] Having said all that, there is no separate and distinct record of paper title for the Laneway itself.

[4] By Warranty Deed dated June 1, 2017, Robert Kelly conveyed title to a small 8' x 8' parcel located on the shore of Sherbrooke Lake (the "**Small Lot**") to the individual Respondents, Buddy Cook, Cindy Mildred Cook and Robert Leo Vernon Cook (the "**Cooks**"). That same day (June 1, 2017) and by separate Quit Claim Deed, Mr. Kelly conveyed whatever interest he had in the Laneway to the Cooks.

[5] The Quit Claim Deed over the Laneway prompted the Municipality of the District of St. Mary's (the "**Municipality**") to commence proceedings under the *Expropriation Act*, R.S., c. 156, s. 1, as amended (the "**Act**"). Because the state of title to the Laneway was in doubt, the Municipality commenced this specific application under s. 17 of the Act for "a determination respecting the state of the

title to the land or any part thereof and to order who had a right, estate or interest in the land at that time and the nature and extent thereof."

[6] The Municipality named both the Cooks and the Attorney General of Nova Scotia as Respondents. The Attorney General did not participate and claimed no interest in the Laneway.

[7] In my Decision, I concluded that:

> …the Laneway is a street which vested absolutely in the Municipality and is currently open for unobstructed use by the public pursuant to Section 308(1) of the *Municipal Government Act*, SNS 1998, c 18 as amended (the "**MGA**"). In the event this is in error and provisionally, the Laneway has been thrown open to the public. Through the doctrine of dedication and acceptance, it constitutes a "common and public highway" which vests with the Province under Sections 11(1) and (2) of the *Public Highways Act*, RSNS 1989, c. 371 as amended (the "**PHA**"). In all events, the Cooks may continue to use the Laneway as members of the public. However, they do not have any private right of way (or private control) over the Laneway. Any such private interests would be inconsistent with the existing public nature of the Laneway. (paragraph 10)

[8] I invited submissions as to costs if the parties could not agree on costs. The parties could not agree. This is my decision on costs.

THE PARTIES' POSTIONS

[9] The Municipality claims to be the successful party and argues that costs should follow the event. The Municipality argues that section 52 of the *Act* does not apply in the circumstances because this provision relates exclusively to proceedings before the Nova Scotia Utility and Review Board. Moreover, the Municipality argues that section 52 focuses upon costs payable to an "owner". It states that the Cooks are not owners of the Laneway for the purpose of section 52. The Municipality takes seeks a lump sum cost award in the range of $5,000.00 – $7,500.00, as a substantial contribution to its actual costs.

[10] The Cooks do not claim entitlement to costs under section 52 of the *Act*. They argue that success was mixed because the issue of whether the Laneway was a public road, was not explicitly stated in the expropriating document and was only first raised by Justice Wood (as he then was) at a preliminary motion. Prior to that time, the Municipality was merely seeking secure access to the water supply system. Because I determined that the Laneway is a street which vested with the

Municipality and was subject to public use, the Cooks state that the Municipality was only partially successfully.

[11] The Cooks further maintain that as private landowners affected by (and named in) expropriation proceedings commenced by the Municipality, general principles of expropriation law apply. In terms of costs, the Cooks argue that these general principles mean that affected landowners should not be made to unduly suffer by expropriation proceedings brought against them. No authority is offered for the general proposition. They seek a lump sum award of $17,162.99, comprised of $15,100.00 (75% of their actual legal fees) plus an additional $2,062.99 in disbursements (excluding HST).

DECISION

[12] I agree (and the parties agree) that section 52 of the *Act* does not apply.

[13] Costs remain in the discretion of the Courts.

[14] In my view, the Municipality is entitled to costs in the circumstances as the successful party. The Municipality sought to secure its interests in the Laneway as a means of accessing and maintaining its water supply infrastructure. It was successful in that effort.

[15] On this point, two additional points bear emphasis:

1. The Cooks did not seek an ownership interest over the Laneway. They sought (as owners of alleged dominant tenements) a right of way by prescription over an alleged servient tenement: the Laneway. In the circumstances, it became necessary to consider the legal rights which accrued to the Laneway and I determined the Cooks did not have the alleged private interest;

2. At paragraph 32 of the Decision, and had it become necessary, I provisionally determined the Cooks proved prescriptive right of way but only over the smaller part of the Laneway located where the Laneway intersects with the public highway and abuts their convenience store and gas bar property. This parcel is defined in my decision as the “Store Property”.

[16] While persons whose interests are adversely affected by expropriation proceeding are typically entitled to the costs associated with defending those

interests, this is not a rule of universal application regardless of the underlying circumstances. In my view, the Municipality (not the Cooks) are entitled to costs for the following reasons:

1. My decision was not for the purpose of determining compensation payable to the Cooks;

2. As indicated, the Municipality was the successful party and costs normally follow the event;

3. The Cooks were unsuccessful in their claim for a private, prescriptive right over the entire Laneway. And they were only provisionally successful in demonstrated prescriptive rights over a small part of the Laneway that abuts the Store Property. Moreover, the evidence in support of the claim for prescriptive rights over the rest of the Laneway (i.e. beyond the Store Property) was limited to a single broad statement by the Cooks in respect of a time period when they did not own any property along the Laneway beyond the Store Property. No evidence was tendered from Robert Kelly who was the Cooks' predecessor in title and who owned the Small Lot at the end of the Laneway, on the shores of Sherbrooke Lake. Mr. Kelly may (or may not) have been able to demonstrate usage sufficient to substantiate a claim for prescriptive rights over the entire Laneway in connection with that Small Lot;

4. The Cooks originally brought proceedings focussed on five parcels of land. However, at the hearing, they indicated that they were only seeking prescriptive rights attaching to two of the five parcels (the Store Property and the Small Lot). To be clear, the Cooks confirmed that they maintained claims of compensation for injurious affection in connection with all five lots but that was unrelated to the proceeding before me.

[17] As to quantum, the parties narrowed the issues before me and, in the end, only required a half-day hearing.

[18] In all the circumstances, I order that the Cooks pay to the Municipality costs in the all-inclusive amount of $2,000.00, payable forthwith.

Keith, J.