**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Burd v. Hersey*, 2023 NSSC 151

**Date:** 20230512
**Docket:** Dig. No. 514393
**Registry:** Digby

**Between:**

Sharon Dianne Burd

*Applicant*

v.

Gail P. Hersey

*Respondent*

## DECISION

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|---|---|
| **Judge:** | The Honourable Justice Scott C. Norton |
| **Heard:** | May 10, 2023, in Digby, Nova Scotia |
| **Decision:** | May 12, 2023 |
| **Counsel:** | Lynette M. Muise, for the Applicant<br>Maggie A. Shackleton, for the Respondent |

**By the Court:**

## Introduction

[1] Sharon Burd filed a Notice of Application in Chambers on April 26, 2022, seeking an Order for reimbursement and costs to be paid by the Respondent, Gail Hersey, for repairs and maintenance and work which were necessary to facilitate the Respondent's enjoyment of a right of way.

[2] The evidence consisted of an affidavit and rebuttal affidavit from the Applicant; an affidavit from the Respondent; and an affidavit from Tyler Handspiker, a contractor that performed the work in question, submitted by the Applicant. Each was cross-examined.

## Background

[3] The background facts are not in dispute. The Applicant is the owner of a servient tenement right of way, located at 8638 Highway 217, in Centreville, Digby County, Nova Scotia. The Respondent is the owner of the dominant tenement of the right of way located at 8630 Highway 217, Centreville. The right of way was granted by agreement of the former parcel owners of the dominant and servient tenements and recorded with the Registry of Deeds on January 22, 1979.

[4] There also exists a public easement, generally known as the Pent Road, that leads from Highway 217 to the shore of Saint Mary's Bay. This road is how, historically, the dominant tenement has exercised the right of way. However, the public easement has existed since 1783. The right of way in question was granted in 1979 and does not state the exact location of the right of way. It allows the dominant tenement "the right at any time to enter upon (the servient tenement) for the purpose of gaining access to a cottage situate on the lands of the (dominant tenement)". It also granted the use of spring water from the brook and the right to place a privy on the Southwest side of the brook.

[5] The Applicant is a retired police officer from Ontario who purchased the servient tenement in 2018 and moved onto the property on August 1, 2019. She initially lived in a newly constructed garage while the main house was completed. She moved into that house in April 2021.

[6] Mr. Handspiker testified that prior to his work, the existing right of way was rough but passable. He said that excavating the Applicant's property to allow for the construction of the garage and house produced a lot of fill and it made more sense to use it improving the road than to pay to truck it away. It was not until after he invoiced the Applicant for the work that it came out that the improved road would benefit other people. He had no communication with the Respondent at the time he was doing the work. He said there was a small hole in a culvert that the road crossed over which was not repaired. He estimated that the cost of repairing the culvert was at least $25,000.

[7] Mr. Handspiker invoiced the Applicant for his work on July 3, 2019, in the amount of $ 52,618.14. This invoice was paid in full. Of the total amount of the invoice, Mr. Handspiker estimates, and it is agreed by the Applicant, that the amount related to the improvements to the right of way, inclusive of HST is $10,821.50. This is the amount the Applicant seeks from the Respondent.

[8] The Applicant testified that Mr. Handspiker constructed a temporary bridge over the culvert to protect it from the heavy vehicles passing over it during construction. She acknowledged that the culvert was not at risk from passenger vehicles.

[9] The Applicant contacted the Provincial Department of Transportation and Infrastructure Renewal to seek a contribution to the expense incurred but was turned down.

[10] The Applicant did not contact the Respondent until after the improvements were made to the road. She testified that because of advice received from her insurer, she decided not to repair the culvert but instead to build a new section of road to avoid crossing the brook. The original section of road leading to the culvert has been blocked off, also after advice from her insurer.

[11] The Respondent acquired the cottage property dominant tenement in 1986 from her mother. The property was in her family since 1955. Extensive storm damage was done to the Pent Road in 1999 and repaired by the Province of Nova Scotia to allow fishers who used the public easement road to get access to the shoreline. In 2003 her family paid to have the alders trimmed back on both sides of the road from the highway to the beach. No further repairs have been done since.

[12] On February 25, 2022, the Respondent received a handwritten note from the Applicant introducing herself and enclosing a July 3, 2019, Invoice from Mr.

Handspiker in the amount of $21,648.71 “for her consideration”. The Applicant then brought a Small Claims Court Claim against the Respondent for this amount that was dismissed on jurisdictional grounds.

[13] The Respondent says that her property is a seasonal cottage and the work done was not necessary for her to exercise the right of way.

**Legal Principles**

[14] The parties agree on the following statement of law from Anger and Honsberger, *Real Property* (Second Edition), 1985, Canada Law Book Inc., p. 952:

> Firstly, the servient owner must not do anything to interfere with the enjoyment by the owner of the dominant tenement of his rights pursuant to the grant of easement.
>
> Secondly, the owner of the dominant tenement has a correlative obligation not to commit a trespass on the servient tenement unless the Act is permitted by the grant of easement. For example, an easement which gives the right to pass and repass with or without vehicles, including trailers, does not include the right to maintain the trailer as a home on the servient tenement unless the grant of easement expressly authorizes this extended use.
>
> Thirdly, the owner of the dominant tenement must carry out any repairs or maintenance or do any work which is necessary to facilitate the enjoyment of the easement. In the result, the grantor of a right of way is under no obligation to construct the way or to maintain and repair it.
>
> Therefore, the owner of a property on which a shared driveway is located has no obligation to the person with whom he shares the driveway to maintain or repair the driveway…
>
> [Emphasis added.]

[15] Neither party provided any additional authority to the Court.

[16] The Applicant says that since it was the responsibility of the Respondent, as owner of the dominant tenement, to carry out repairs necessary to facilitate her own enjoyment of the easement, it logically follows that the invoice for the necessary repairs to the easement should be the Respondent’s responsibility. The Applicant, as owner of the lands upon which the right of way exists, is under no obligation to construct the way or to maintain and repair it, but she did so to facilitate the respondent’s enjoyment of the easement.

[17] The Respondent says there is no basis in law for the relief sought by the Applicant. First, the Respondent disputes that the repairs were necessary to facilitate her enjoyment of the right of way. There is no principle at common law that states the determination of "necessary" to the dominant tenement holder may be determined by the servient tenement holder. Here, the Respondent did not voice or request in any way the repairs initiated by the Applicant. The Respondent was not consulted before the work was commenced or at any time before the work was completed. The Respondent's cottage is accessed only seasonally once a year (or not at all) by the Respondent and historically her family has made any "necessary" repairs.

[18] I am not persuaded that the Applicant has any legal right to claim the expense incurred to improve the right of way from the Respondent. The law is clear that it is the Respondent who, as dominant tenement, is obligated to do any work that is necessary to facilitate the enjoyment of the easement. If the Respondent cannot use a vehicle without improving the road, it is the Respondent's choice to walk instead of paying for the improvement.

[19] The Applicant acknowledges that the Respondent could not conduct repairs to the easement and then seek reimbursement from the Applicant. This is well established by the authorities. See *Middlesex Condominium Corp. No. 229 v. 1510231 Ontario Inc*., 2016 ONSC 6325.

[20] The Applicant could not provide the Court with any legal principle or authority for the proposition that the servient tenement could decide for the dominant tenement what was necessary to facilitate the enjoyment of the easement. In my opinion, the Applicant acted precipitously in carrying out the work without consulting with the Respondent in advance and obtaining agreement that the work was necessary and that the cost of the work was reasonable and would be paid by the Respondent.

[21] The Application is dismissed.

[22] If the parties are unable to agree on costs, I will accept their written submissions to be provided to me within two weeks from the date of my decision.

[23] Order accordingly.