SUPREME COURT OF NOVA SCOTIA
Citation: *Shea v. Bowser*, 2014 NSSC 211

Date: 20140707
Docket: *Halifax*, No. 348548
Registry: Halifax

Between:

James David Shea and Linda Shea

Applicants

v.

Loyal F. Bowser and Wendy Lynn Bowser

Respondents

DECISION

Judge: The Honourable Justice Peter Rosinski

Heard: June 5 and 6, 2014, in Halifax, Nova Scotia

Decision: July 07, 2014

Counsel: Robert Pineo and Heather Wyse, for the Applicants
Wendy Lynn Bowser (with the assistance of Cathie Goldman)

By the Court:

Introduction

[1] The history of this proceeding is explained in the decision of the Nova Scotia Court of Appeal: **Shea v. Bowser**, 2013 NSCA 18.

[2] In summary, the Sheas sought a declaration that they were entitled to a right-of-way over the lands of the Bowsers to access their properties in the Ostrea Lake/Pleasant Point area. I found against the Sheas on this issue.

[3] The Nova Scotia Court of Appeal reversed my decision and stated:

> [30] I would allow this ground of appeal and find that there are express grants of right-of-way over the Bowser Lot to Lots A and B. I would remit the matter to the court for determination of the location of the right-of-way. In so doing I would not place any restrictions on the application judge to receive further evidence or submissions from the parties.

[4] Thus, my task at the reconvened application in chambers on June 5, 2014 was to identify the location of the right-of-way over the Bowser land which the Court of Appeal has stated exists in law.

[5] At the hearing, for the Sheas, I had the benefit of the expert opinion of Nova Scotia land surveyor and photogrammaticist Thomas F. Giovannetti Bsc. Eng., P.Eng, NSLS, QPI who filed an affidavit containing his opinion. He was extensively cross-examined thereon.

[6] Mrs. Bowser presented evidence through witnesses who resided in the area and were familiar with the history of the properties in question: Darrell Wayne Kent; Douglas Charles Walker; Heather Elizabeth MacLellan; Mark Scott Murphy; and Mrs. Bowser herself testified.

[7] Largely by agreement, both parties tendered exhibits:

> 1. Exhibit 1 – the right-of-way investigation report of Thomas Giovannetti;
>
> 2. Exhibit 2 – plan of survey by Kenneth Robb certified September 4, 1991 showing lots 100, 200 and right-of-way "300" of the lands of Gordon and Lois Slauenwhite which lie immediately South East of the Bowser property and Northerly of the Sheas property. That plan references by notes thereon, lots A and B owned by the Sheas, and for which properties they claim the right-of-way over the Bowser property.

The note on lot B states:

> FOR PREVIOUS SURVEY OF THIS AREA SEE PLAN SHOWING SUBDIVISION OF LANDS OF GLADYS M. BOWSER DATED THE 3RD DAY OF AUGUST A.D. 1966 SIGNED BY DAVID R HILTZ, PLS. [which plan is attached to the deed from the Conrads to the Sheas dated and registered in 1971.]

The note on lot A states:

> FOR PREVIOUS SURVEY OF THIS AREA SEE PLAN SHOWING SUBDIVISION OF LANDS OF GLADYS M. BOWSER DATED THE 8TH DAY OF SEPT. A.D. 1968 SIGNED BY H.K. WEDLOCK, PLS. [which plan is attached to the deed from Lester Smiley to the Sheas registered and dated in 1971.]

3. Exhibit 3 – a 2003 aerial photograph of the Bowser property, abutted by the Gordon and Lois Slauenwhite property above-noted; and also showing portions of lots A and B owned by the Sheas.

4. Exhibit 4 – a 1974 aerial photograph of the same area as in Exhibit 3;

Exhibit 5 – a July 16, 2007 letter from Les Doll, a lawyer with Melnick Doll Condran addressed to Loyal Bowser and Wendy Bowser regarding "Right-of-Way – David Shea". It contains aerial photographs identified in writing as "Plan A" and "Plan B" as well as an April 23, 1971 deed from the Conrads to the Sheas conveying Lot A to the Sheas; a draft/proposed "right-of-way easement" to be signed by the Bowsers and Sheas as referenced in the attached schedule "A" being a plot plan by G.R. Myra Land Surveying Limited of Lawrencetown, Nova Scotia dated November 28, 2005 and entitled "Plot plan showing gravel driveway over lands of Loyal F. Bowser and Wendy Lynn Bowser".

Where on the Bowser lot is the right-of-way located?

Position of the parties - Loyal and Wendy Bowser

[8] Mrs. Bowser appears to have come to the hearing under the mistaken impression that the Court of Appeal's decision remitting the matter to me to determine the location of the right-of-way in question, permitted me to reconsider whether the location of the right-of-way was even on her property. After I clarified for her that the Court of Appeal's decision meant that I had to determine a location of the right-of-way somewhere on her property and nowhere else, she confirmed her alternate position expressed in her written brief of June 4, 2014 that the "Old Main Road" which also crosses over "her property", since she owns land immediately to the north and south of the "Old Main Road", was the right-of-way intended to benefit the Sheas.

[9] During the hearing her position in that respect became more apparent. Mr. Pineo rightfully pointed out that the "Old Main Road" could not be the right-of-way in question primarily because it is public property; but also because it would mean every other person who had land intersected by that road, between the Sheas' property and a publicly accessible road such as the Ostrea Lake Road, would also have had to have granted a right-of-way to the Sheas; moreover, the "Old Main Road" can easily be distinguished from the right-of-way given here which is described as "Gladys Bowser's Road", and as being "apart" Gladys Bowser's house.

[10] I note that an Etymological dictionary of Modern English, (John Murray, Albemarle St.W, London England, 1921) "apart" is described as originating from the French word "apart" which is translatable as "aside".

[11] I clarified for Mrs. Bowser that the "Old Main Road" could not, in law, be the right-of-way in question here. She then proceeded to call the witnesses herein.

[12] At the end of the hearing Mrs. Bowser's position was that the travelled areas shown on the aerial photographs of 1964, 1974, and 2003, as a result of the passage of time and the changing topography, whether by nature's hand or human hands, are not necessarily the location of the right of way that was intended by the generalized description in the deeds giving an express grant of right-of-way to the properties owned by the Sheas. Since there was no aerial photograph from 1971/72 the Court therefore does not have a precise photo of the actual roadway in existence over the Bowser property when the Sheas acquired Lot A and Lot B.

[13] I will point out here that according to the decision of the Court of Appeal, the references in the deeds to "Gladys M. Bowser's road leading past her house" [lot B] and "Gladys Muriel Bowser's road leading apart her house to lot No. (A)" [lot A], arose as a matter of law from the predecessor deeds, including the 1963 deed from Gladys Muriel Bowser to the Conrads, which included the words "Gladys Muriel Bowser's road leading apart her house to lot No. (A)", and presumably similarly in the deed from Gladys Bowser to Lester Smiley regarding Lot B, which has never been placed into evidence; as well as the reference in the 1925 deed from the Williams to Gladys Bowser [registered in 1944] which granted to her the property, "also the privilege to use the road from the new road apart the house to the Old Road".

[14] Similarly the deed from Gladys Bowser to Frederick Bowser in 1967, which are the lands over which the right-of-way is claimed, and were subsequently

conveyed in 1985 to Loyal and Wendy Bowser by his widow Mary Anna Bowser, contained a reference:

> This described lot being and intended to be **part of** the same lands as were conveyed by Howard Williams and Maizie Williams to the said Gladys Bowser, by deed dated Feb. 11th, 1925, recorded at Halifax March 16th, 1944, in Book 871, Pages 605 – 608.
>
> Comprising 3.9 acres more or less, and shown enclosed by red lines on the plan hereto annexed.
>
> Saving and Excepting from the above described lot that portion that lies within the limits of the old main road, **also reserving any rights previously granted for use of the road to the shore**.

[15] The deed from Mary Anna Bowser to the Bowsers contained in the description the following:

> The described lot being an intended to be part of the same lands as were conveyed by Howard Williams and Maizie Williams to the said Gladys Bowser, by deed dated Feb. 11th, 1925, recorded of Halifax March 16th, 1944, in Book 871, Pages 605 – 608.
>
> Comprising 3.9 acres, more or less, and shown enclosed by red lines on the plan hereto annexed.
>
> Saving and Excepting from the above described lot that portion that lies within the limits of the old main road, **also reserving any rights previously granted for use of the road to the shore**.

[16] At the hearing before me on June 5, 2014 Mrs. Bowser testified that before she and her husband Loyal bought the property in question here from Mary Anna Bowser in 1985, they made inquiries of a lawyer named Burton regarding what right-of-way, if any, encumbered their property. She testified that he answered that only the Old Main Road affected their property. I note that a lawyer by the name Burton signed the Affidavit of Status in the Deed transferring the property to them in 1985. Moreover, I note that a detailed description, and a formal plan thereof, suggestive of the involvement of a person trained in land surveying, yet not a certified Provincial Land Surveyor, was included with the 1967 deed from Gladys Bowser to Frederick Bowser, and also the 1985 deed from Mary Anna Bowser to Loyal and Wendy Bowser. No right-of-way is shown across the lands of the Bowsers on the plan.

[17] Mrs. Bowser's uncontroverted evidence throughout has been that she had not met or seen the Sheas until 1995. That was her testimony in para. 16 of the

affidavit that she and her husband jointly swore herein on September 13, 2011, and was her testimony at trial.

[18] Notably the jointly filed affidavit of the Sheas sworn November 23, 2010 at paras. 20 and 21 read in part:

> We have openly, notoriously, and continuously use the "old" deeded right of way since acquiring the properties in 1971 and 1972. Until the mid 1980s we would access our properties quite frequently over the spring, summer and fall and had a small camp on it for our family's enjoyment. Since the mid 1980s we used the properties less frequently but a year has not gone by where we have not accessed our properties.
>
> [The Bowsers] have since in or around 1995 completely blocked the original right of way such that the location of the "old" right of way is no longer visible on the ground. [The Bowsers] have also frequently obstructed the "new" right of way – they have placed old tree stumps on the right of way making it more difficult to cross over and have from time to time placed parked vehicles on the right of way completely obstructing it and making it impossible for us to access our properties. They have placed signs such as "private property", "stop" and "no trespassing" on and around the right of way. [The Bowsers] have made it extremely uncomfortable for us to use the right of way because of these tactics and also because of their attitude in so far as one day they are admitting to us that we have a right of way and the next they are denying it. [See also para. 16]

[19] The significance of all this appears to be that it was not until 1995 [10 years after they purchased their property] that the right-of-way dispute came to the attention of the Bowsers.

[20] Nevertheless, the importance of all of the above-noted is that the right-of-way expressly granted in the deeds to the Sheas was identified no more precisely than it was to be over "Gladys Muriel Bowser's road leading apart [past] her house". This was the intention of the parties to the deeds.

[21] Mrs. Bowser contends that since the old right-of-way/Gladys Muriel Bowser's road is no longer in place, that the Court has discretion to order a different location upon her land for a new right-of-way/road, built at the cost of the Sheas, and so grant the Sheas the right-of-way they require to access their properties.

[22] She indicated her preference would be to have such a right-of-way as far to the westerly side part of her property as possible.

Position of the parties - David and Linda Shea

[23] The Sheas argue that since the right-of-way they are entitled to is the one which was intended to be conveyed in the deeds of 1971; therefore the location of "Gladys Muriel Bowser's road" on the ground at that time is determinative. They cite the aerial photographs of 1964 and 1974 as evidence of its location. They point out that the road in the 2003 aerial photograph shows a significant deviation in the southerly portion of the road, and that it is consistent with the evidence of Darrell Kent about the roadway constructed by he and Douglas Walker in 2001, which is evident in the 2003 aerial photograph.

[24] They argue that irrespective of the location of the present road, they are entitled to a road in the same location as it was in 1971, which they say is best represented and can be inferred from the aerial photograph of 1974.

[25] While Mr. Giovannetti's report suggests the southernmost portion of that road at present may encroach on the neighboring property in the area where the road intersects the Old Main Road, the Sheas would not accept their right-of-way tracking the present road, even if a slight diversion at the end thereof to avoid encroachment on the adjacent property were effected.

[26] Incidentally they also claimed the following relief:

- Costs of the hearing for June 5 and June 6, 2014 according to Tariff C- Rule 77 which suggests $2,000 per day or $3,000 for the 1 ½ days;
- A further $1,000 to compensate for the fact that this application in chambers was determinative of the entire matter at issue in the proceeding per Tariff C (4);
- Disbursements, specifically being the cost of Mr. Giovannetti's report [estimated to be approximately $5,000] and payment for his time attending at court on June 5, 2014 [from 1:00 pm to just before 3:00 p.m. according to the court log];
- That Mrs. Bowser pay back the $6,000 plus $302.75 costs and disbursements ordered by me at the initial hearing and paid by the Sheas to the Bowsers;
- That Mrs. Bowser pay approximately $300 to the Sheas to effect the registration of the documentation to confirm the right-of-way they have over the Bowser property or that Mrs. Bowser undertake to do so herself;
- In their written brief the Sheas also requested the court to "include a provision, enjoining the respondents [Mrs. Bowser] from interfering with the applicant's use of the right of way as declared…"

Determination of the location of the right-of-way in favor of the Sheas

[27] It is reasonable to infer that the 1974 aerial photograph contains the most accurate depiction of "Gladys Muriel Bowser's road" and the extent of the right-of-way to Lots A and B granted to the Sheas by the 1971 deeds. Having gone back to look at the aerial photographs of 1982 and 1992, being Exhibits "C" and "D" at the initial hearing, with the assistance of a magnifying glass one can see that the road during those years was similarly located as it is shown in the 1974 aerial photograph.

[28] Nevertheless, while both parties had an obligation to maintain that right-of-way (neither did), by some point in time, this southernmost portion of that road became less and less used and consequently overgrown – see for example the 1993 aerial photograph attached to the July 16, 2007 letter of Les Doll at Exhibit 5. The evidence of the initial hearing included photographs taken in 1995 by Mr. Shea, that also showed the right-of-way as overgrown by grass – see para. 19 and Ex. "T" of the Sheas' Affidavit sworn November 23, 2010.

[29] The ensuing consequence was that by 1995, the road was more likely than not, no longer passable by automobiles and that therefore the original right-of-way/road no longer existed, on the ground, south of the house and up to the Old Main Road.

[30] Then in 2001 Douglas Walker and Darrell Kent built a new road from near the house to the Old Main Road as shown in the 2003 aerial photograph.

[31] Although without the express permission of the Sheas, but to their benefit since it allowed them renewed access by car to the Old Main Road, Mr. and Mrs. Bowser permitted Dougie Walker [and Darrell Kent] to build a road in a slightly different location than the original, on the southern portion of the property and intersecting the Old Main Road as shown in the 2003 aerial photograph.

[32] It is not in the interests of justice to now cause to be rebuilt, in its original location closer to the house, the southern portion of the right-of-way granted across the Bowsers' property to the Sheas.

[33] As I understand it, the road shown in the 2003 aerial photograph remains representative of the road at present. That being the case it would be very much of any questionable benefit to anyone, even the Sheas, to rebuild in its original location the southern portion of the right-of-way granted. Notably, the present

location of the road/right-of-way actually provides easier, closer access to the properties of the Sheas.

[34] I therefore declare that the right-of-way, expressly granted to the Sheas in the 1971 deeds, to allow them access to Lots A and B, is located where the present roadway is located on the Bowser property [subject to it being diverted if necessary to avoid encroaching on the adjacent property as identified by sketch 1C at Tab 4 of Mr. Giovannetti's report herein] running from the Ostrea Lake Road to what has been referred to as the "Old Main Road".

[35] Should the Sheas wish to more precisely delineate that roadway for purposes of registering their right-of-way, it will be their responsibility to have it surveyed, and to pay any consequent costs associated therewith.

[36] The Sheas had also requested in their written materials that I order "a provision, enjoining the respondents from interfering with the applicant's use of the rights of way as declared."

[37] I am not satisfied that such a provision is required. I expect that Mrs. Bowser will ensure that whoever is entitled to use the right-of-way, is able to do so without any interference or intimidation. Furthermore, I note that if the Sheas decide to have the right-of-way surveyed, any land surveyor and those working with him are entitled as a matter of law to enter onto any private property whatsoever to effect their land surveying duties, and that it is an offense to interfere with their work in that respect.

[38] I note that the roadway has been, and is likely of inconsistent width, and so an issue may arise as to the proper width of the right-of-way. Mr. Lumsden in his report contained within that of Mr. Giovannetti, stated at page 3:

> … the traveled way clearly connected [Ostrea] Road and the Old Main Road through the Bowser lot and appeared to be well maintained.
>
> There was very little change in terms of width or location of the traveled way between the years 1964 & 1974, with the average width of the road being 8.0 feet.

[39] I therefore declare the right-of-way to be 8 feet in width. I do not intend hereby to rescind or diminish the original obligation on those receiving the benefit of the right-of-way to help maintain it.

Incidental Relief

[40] Regarding the costs of the original hearing, and in the Court of Appeal, the Court of Appeal stated that "each party shall bear their own costs of the appeal and the application below" – para. 54.

[41] As to the costs claimed by the Sheas regarding the June 5 and 6, 2014 hearing, I keep in mind that costs are to be awarded with a view to doing justice between the parties. That requires a nuanced yet principled consideration of the relevant circumstances.

[42] Generally costs are awarded to the party seen to be "successful" in the matter.

[43] To the extent that the Sheas will have a declaration confirming their right-of-way over the property of the Bowsers, they may be said to have been "successful". However, their success in that respect was all but guaranteed by the decision of the Nova Scotia Court of Appeal. The only dispute that remained was the precise location of the right-of-way on the Bowser property.

[44] On this, counsel for the Sheas urged the Court to find that Mrs. Bowser had presented "unnecessary evidence" and "wasted time" on June 5th. He argued that the report of Mr. Giovannetti was unequivocal, and could not seriously be disputed as to its conclusion regarding the location of the right-of-way on the Bowser property.

[45] In my view, Mrs. Bowser was entitled to cross examine Mr. Giovannetti. That cross-examination, and the necessary process of his qualification as an expert by the Court, occupied practically all the time that he was in court and testified.

[46] Mrs. Bowser's witnesses testified from 3:00 p.m. to 4:30 p.m. Some of their testimony was consumed by cross examination, which presumably suggests that counsel for the Sheas found it necessary to do so. They were present from 9:30 am onwards, and came at their own expense.

[47] Darrell Kent testified about the history of the usage of the original driveway/right-of-way; the circumstances surrounding the 2001 new extension of the driveway on the Bowser property, given that overgrowth had obscured the original southern-most portion of the driveway intersecting the Old Main Road. He also identified the small camp, which would appear to be that of the Sheas on Lot A.

[48] Douglas Walker similarly testified. It was also through him, though by consent, that Ex. No. 5 – the Les Doll July 16, 2007 letter and attachments were entered into evidence.

[49] Heather MacLellan is a sister to Wendy Bowser, and testified briefly about having lived there between 1966 in 1978, and her observations during that time.

[50] Mark Murphy is Wendy Bowser's son-in-law, who has lived in the area since 2005, and some of that time specifically at Mrs. Bowser's house on the property. Albeit not directly relevant to the issue before the court at the hearing, his testimony was brief.

[51] Mrs. Bowser testified about facts she considered important to her legal position in this application. It was clear from her testimony that she believed based on her conversation with her counsel in 1985 (Mr. Burton) that the only "right-of-way" across her property was the Old Main Road. She did not believe otherwise until 1995 when Mr. Shea expressly suggested to her that his right-of-way passed over her land very close to her house. She asked for proof and it appears that the Sheas were unable to confirm the location of the right-of-way. At the initial hearing before me there was evidence that Kent Rogers, their counsel in June 2007, had registered a Form 6A (correction of the previously submitted Certificate of Legal Effect) – Exhibit 1A.

[52] In my decision I stated:

> [70] … Before 2007 the Sheas had had their right of way registered as in relation to servient tenement PID # 40591240 (Slaunwhite's property) and then changed the servient tenement to PID # 40058349 (Bowsers' property), on June 26, 2007 - see Exhibit #1A herein, being a Form 6A Corrected Certificate of Legal Effect completed by Kent W. Rodgers. No explanation was offered for this correction by Mr. Rodgers. The Sheas suggested it was a mere mistake in the first instance, without elaborating.

[53] It seems clear to me that for many years, the Bowsers and Sheas were both uncertain of where the deeded right-of-way was actually located. In 1995 however things came to a head.

[54] Given this uncertain state of affairs, it is unfortunate, though understandable, that the parties could not agree without the matter having to go to court.

[55] In fairness, counsel for the Sheas is correct that the evidence presented by Mrs. Bowser through herself and her witnesses, was in some respects unnecessary.

I acknowledge that the Sheas have been required to be steadfast and patient in their pursuit from the courts of confirmation of the existence and location of their right-of-way, and that they have had to spend money for that purpose.

[56] On the other hand, I keep in mind that Mrs. Bowser and Ms. Goldman who assisted her throughout this hearing, are not legally trained. In my view, they conducted themselves in a reasonable manner, given their level of understanding of the legal concepts involved. They did not purposefully intend to extend the hearing any longer than they genuinely considered necessary to present the facts upon which they wished to rely and their legal argument.

[57] Considering the above-noted, and the circumstances generally of this case, I am of the view that the parties should bear their own costs.

[58] However, as to the cost of the report of Mr. Giovannetti and his attendance in court, I order that 50% of those costs be paid for by Mrs. Bowser. Those expenses are fairly and reasonably accounted for in the invoices submitted to the Court by Mr. Pineo's June 18, 2014 letter. The total of Mr. Giovannetti's invoices are $6,917.25. Therefore, Mrs. Bowser will be responsible to pay the Sheas $3,458.62 as her half of the contribution.

[59] Although requested by the Sheas, I need not order Mrs. Bowser to return to the Sheas the $6,302.75 dollars paid pursuant to my initial decision. This is not required because the Court of Appeal has already ordered that:

> [52] I would rescind the costs order made on the application and order that no costs be awarded to either party on that application.

[60] Judgment accordingly.

Rosinski, J.