SUPREME COURT OF NOVA SCOTIA
Citation: *MacNeil v. MacNeil*, 2014 NSSC 307

Date: 2014-08-19
Docket: Syd. *No. 418332*
Registry: Sydney

Between:

Timothy Paul MacNeil, Virginia Susan MacNeil, Russell Baker, Mary Jennifer Baker, Gordon MacNeil, Sheila MacNeil, Dan Angus MacNeil and Marion Gale MacNeil

Applicants

v.

Terrence MacNeil and Anne MacNeil

Respondents

Decision on Costs

Judge:	The Honourable Justice Frank Edwards
Heard:	March 25, April 9, 10, 11, 14, 15, 1 22, 24, 25, and May 1, 2014, in Sydney, Nova Scotia
Final Written Submissions:	June 24, 2014
Written Decision:	August 19, 2014
Counsel:	Robert Sampson, Q.C. and Jennifer Anderson, for the Applicants Darren Morgan, for the Respondents Mark V. Rieksts, for the Registrar General, Land Titles, Intervenor

By the Court:

Background: (extracted in edited form from the Respondents' Brief on Costs dated June 6, 2014).

[1] The Applicants applied to the Court pursuant to Subsection 74(2)(b) of the ***Land Registration Act***, S.N.S. 2001, c.6, for an order confirming the existence and scope of an easement across and on real property owned by the Respondents and identified as PID: 15590326, which allows access to and use of a beach area known locally as "the Point".

[2] In addition, the Applicants sought an injunction prohibiting the Respondents from taking any actions to block or otherwise impede access to or use of the Point by the Applicants and their successors in title or, in the alternative, by the public at large. They also sought an order requiring the Respondents to not unreasonably withhold their consent for the issuance of any Nova Scotia Department of Natural Resource Permit sought for the construction of stick wharves or docks at the Point by the Applicants or their successors in title. As well, the Applicants sought an order against the Respondents in nuisance.

[3] At the hearing of a Motion for Directions, Justice Bourgeois set the trial for five days of hearing on February 10-14, 2014. At the same time, a timeline for the

filing of Affidavits by the Applicants and Respondents was set out, with the dates for Respondents' Affidavits and Applicants' Rebuttal Affidavits subsequently extended by consent to December 3, 2013 and December 20, 2013 respectively.

[4] The Applicants proceeded to file ten Affidavits on October 31, 2013. Full Affidavits were filed by Timothy MacNeil, Mary Jennifer Baker, Sheila MacNeil, and Dan Angus MacNeil, while each of their respective spouses filed brief "spousal" Affidavits, which consisted of approximately two pages each, and in which the Affiants essentially affirmed their agreement with the contents of their respective spouses' full Affidavits.

[5] As well, Affidavits were filed in support of the Applicants by James Gerard MacNeil and Karen Anne MacNeil. The Respondents filed Affidavits by eight witnesses. The Respondents also filed an expert report by David Attwood, N.S.L.S.

[6] After the Respondents' Affidavits were filed, the Applicants filed four rebuttal Affidavits just before the December 20, 2013 deadline, by Applicants Timothy MacNeil, Sheila MacNeil and Russel Baker/Mary Jennifer Baker (jointly), and by William Kenneth Brake. The office of Counsel for the

Respondents then closed for the holidays on December 20, 2013, reopening on January 6, 2014.

[7] Counsel for the Respondents received from opposing Counsel on January 7, 2014, a copy of the Applicants' Settlement Conference brief for the Settlement Conference then scheduled for January 14, 2014. At the same time, the Applicants provided a Rebuttal Affidavit of Thelma MacNeil explaining that the late filing was due to inadvertence.

Pre-Hearing Motions:

[8] On January 10, 2014, Counsel for the Respondents submitted a Motion to Strike the Rebuttal Affidavits of Kenneth Brake and Thelma MacNeil. That same day, Counsel for the Applicants filed a Motion to have the Rebuttal Affidavit of Thelma MacNeil admitted into evidence and also to strike portions of the Affidavits of the Respondents. The Respondents subsequently filed an additional Motion on January 23, 2014 to strike portions of the Applicants' Affidavits on the basis that they include inappropriate hearsay and/or inappropriate rebuttal evidence.

[9] The Settlement Conference that had been scheduled for January 14, 2014, was postponed due to unavailability of a Justice. The Settlement Conference was

not ultimately rescheduled as the Respondents determined that the position taken by the Applicants did not lead them to reasonably believe that settlement via this avenue was a realistic possibility.

[10] Given the numerous pre-hearing Motions filed by both parties, and the fast approaching hearing dates, I convened a Pre-trial Conference with Counsel. At that time, I directed that the pre-hearing Motions would be determined on February 11, 2014, with the hearing dates for the Trial then rescheduled for four days, being April 9-11 and 17, 2014.

[11] During the hearing of the pre-hearing Motions, a great many paragraphs were stricken from the evidence filed by both parties. A significant number of paragraphs were stricken from the Respondents' Affidavits, most of which was hearsay evidence pertaining to the deceased previous owners of the property in question.

[12] I did not deal with the issue of costs with respect to these pre-hearing Motions at the time of their determination, indicating that costs would be addressed upon the conclusion of the proceeding.

Length of Trial:

[13] The trial in this matter ultimately consisted of ten days of evidence, one-half day for a site view, and one day of closing submissions. With respect to the ten days of evidence, I would note that four of those days consisted of the Respondents' witnesses being cross-examined. I would also note that Counsel for the Respondents had a total of 11 witnesses to cross-examine, who filed a total of 14 Affidavits and Rebuttal Affidavits. By comparison, Counsel for the Applicants had nine witnesses to cross-examine, based upon their eight Affidavits and the report of David Attwood. But, as referenced elsewhere, the cross-examination by Respondents' Counsel was needlessly lengthy and tedious.

Quantum of Costs:

[14] Rule 77.02(1) provides that the Court has very wide discretion in addressing costs.

> 77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[15] Rule 77.03(3) provides that costs will normally follow the result in a proceeding, but a judge has the clear authority to do otherwise if he/she sees fit:

> 77.03(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[16] Rule 77.06 deals specifically with an award of costs at the conclusion of a proceeding:

> Assessment of costs under tariff at end of proceeding
>
> 77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.
>
> (2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.
>
> (3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[17] Counsel for the Applicants correctly notes that in calculating an award of costs pursuant to the Tariffs, "the general rule is costs should represent a substantial contribution to a party's reasonable legal expenses, but not a complete indemnity", and that where issues involved are substantially non-monetary, an assessment of costs must first involve a determination of the amount involved, which determination is to be based upon the complexity of the proceeding and the importance of the issues to the parties.

[18] The present matter did involve non-monetary issues; the issues involved factual determinations with respect to the extent and nature of usage by the Applicants and their predecessors in title of the pathway and the Point, and

whether or not any such usage was carried out with or without consent and in accordance with the clearly defined conditions necessary to establish a prescriptive easement. Regarding the deeded easements, I considered that expert evidence of Mr. Attwood and the law with respect to interpretation of deeds.

[19] In their submissions, Counsel for the Applicants claim that the six Applicants who were awarded costs "were entirely successful" on the issues pertaining to the easements they claimed. That was not the case – the Applicants claimed rights to use the Point without restriction on the mooring or storage of watercraft, or on the activities in which they can engage (e.g. bonfires, placement of raft, wharves and stick wharves), or on the size of the pathway/property over which they have access. All of these were curbed and restricted in my decision. I also denied their claim in nuisance and the injunction application. Still, the Applicants were successful on the central issue, the existence of the prescriptive easements.

I. Preliminary Motions: February 11, 2014:

[20] The most time consuming aspect of this motion related to the impugned hearsay paragraphs in the Respondents' affidavits. The Applicants were largely

successful in having most of the impugned paragraphs struck (153 of the 165 identified by the Applicants for exclusion).

[21] Conversely, I also struck a great many paragraphs in the Applicants' Rebuttal Affidavits. These paragraphs were responsive to the hearsay initially submitted by the Respondents. Once the latter were struck, the former were no longer necessary. Their exclusion cannot therefore be viewed as a victory for the Respondents.

[22] The Motion required substantial preparation and consumed almost a full day of court time. I have no difficulty deciding that the three (of the four) Applicant couples entitled to costs should have costs of these motions. I award $1,500.00 costs (i.e. ¾ of $2,000.00) to the three Applicant units.

II. The Applicants' Legal Fees:

[23] Time and fees charged amounted to just over $103,000.00 (before HST) plus disbursements of $5,475.78.

[24] Given the length and complexity of the matter, I am satisfied that it was reasonable for the Applicants to have two counsel involved in the preparation and conduct of the case.

[25] I am not satisfied that the Applicants were entitled to bill their clients for the attendance of the articled clerk DPB in court. DPB, from what I could observe, did not take notes. He was there for his own legal education as an observer. The law firm absorbs that expense.

[26] Conversely, the articled clerk LMCD did take notes for Ms. Anderson on days when Mr. Sampson could not attend. Her expense for attendance in Court and billed to the clients (thus considered in assessing costs) is justified. On the Respondents' side, as I suggested to Counsel, there should have been someone present (a paralegal or secretary) to take notes. The proceeding was lengthened by Counsel's attempt to simultaneously take notes and cross-examine affiants. It was false economy (not to mention appallingly tedious for everyone else) for Counsel to proceed in this manner. In future cases, I simply will not permit it.

[27] It is not my intention to do a full taxation of the Applicants' Counsels' account. However, I am satisfied that the four Applicant units have legitimately incurred legal fees (including disbursements) in the $100,000.00 range. As such, the three Applicant units to whom I have indicated entitlement to costs are subject to legal expenses of $75,000.00 (or $25,000.00 per unit).

[28] This case involved non-monetary issues. As such, it is an artificial exercise to establish an "amount involved" by whatever means. The issues involved were obviously important to the parties. The Applicants, had they been unsuccessful, would have been left with cottage properties and no access to the water frontage. The Respondent obviously wanted exclusivity so far as the use of his property was concerned.

[29] The conflict between the twin brothers led to this intractable legal dispute. Had this fraternal conflict not existed, it is possible that this matter could have settled or, at least, been determined in a less extensive (read shorter) legal proceeding. What the Applicants should acknowledge is that in any event, some form of legal determination would have been required at some point. The Applicants' continued enjoyment of their properties (not to mention the financial value of same) was ultimately dependent on such a determination. They now have it, and so they, their heirs or successors have an enduring benefit because this proceeding happened.

[30] In their briefs on costs, both Counsel referred to a settlement offer put forward by the Applicants on January 29, 2014. Respondents' Counsel argues that, because the offer was marked "without prejudice", I should not consider it. If that were the case, it would be a rare instance where the Court would know anything

about settlement offers other than those filed under Rule 10. CPR 77.07(2)(b) clearly contemplates otherwise:

> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application;
>
> …
>
> (b) a written offer of settlement, whether made formally under Rule 10 – Settlement or otherwise, that is not accepted;

[31] The Respondents should have accepted the offer. While they did get a clearer definition of the scope of the easements in my decision, overall, they would have been better off accepting the offer or, at least, making a counter offer (or re-scheduling the cancelled settlement conference).

[32] Under Tariff A, the Applicants are entitled to $2,000.00 a day for 11.5 days or $23,000.00. In addition to that, if I were to deem the "amount involved" to be between $200,001.00 and $300,000.00, an amount of $22,750.00 would be added. The total recoverable under Tariff A would therefore be $45,750.00. If I were awarding costs to all four Applicant units, that amount would be clearly inadequate. For the three Applicant units, the amount is fair. I therefore award the three Applicant units a lump sum (excluding disbursements) of $45,000.00 in addition to the $1,500.00 on the chambers motion. I also award them an additional

$600.00 costs on the submissions on costs. I will allow each of the three eligible Applicant units $1,200.00 for disbursements (i.e. total $3,600 for disbursements).

[33] I find it ironic that the Respondents now plead impecuniosity regarding their ability to pay costs. To support that claim, Counsel has provided copies of mortgages encumbering the Respondents' properties. These are the same Respondents whose actions unnecessarily lengthened the proceedings (Terry's actions as outlined in my decision, as well as Counsel's tedious conduct of the hearing). Counsel will recall that, on at least two occasions before the hearing with their clients present, I pleaded with the parties to negotiate. I referred specifically to the potential of a huge costs award.

[34] These pleas obviously fell on deaf ears. Not only did the Respondents reject a perfectly reasonable settlement offer, but they did not counter offer or show the slightest willingness to negotiate. They even refused to re-schedule a settlement conference. It is clear that the Respondents took the position that this was to be a fight to the finish and they would make no compromises. With that background, their plea of impecuniosity will find no sympathy here.

[35] I note that the two mortgages are of very recent vintage, well after the start of this litigation. The first payment date for the $172,000.00 mortgage was August

22, 2013, while that on the $92,000.00 mortgage was April 6, 2014. I remind the reader that preliminary motions were heard on February 11, 2014 and the hearing itself between March 25, 2014 and May 1, 2014. There is no explanation about what happened to the proceeds of those mortgages. Counsel does refer to the Respondents incurring "… tens of thousands of dollars in legal fees …".

[36] In short, I am not satisfied that the Respondents cannot pay the award of costs. In the circumstances, I am satisfied that their obligation to pay the Applicants' costs takes priority over any legal fees (if any) still owed to their own counsel.

[37] To be practical, I will order the following payment terms: $21,000.00 payable forthwith no later than September 30, 2014, with the balance payable in full by September 30, 2015. All amounts received will be shared equally by the three named Applicant units until the costs award is paid in full. No HST is payable on costs. Counsel will have to modify paragraphs 4, 6 and 10 of the proposed Order.

III. Form of Order:

[38] After considering the written representations of Counsel (most recently from Respondents' Counsel on June 24, 2014), I have decided the following:

[39] ***Paragraph 16:*** On June 18, 2014, Applicants' Counsel advised that posts perpendicular to the pathway had been installed. (Photos of same were attached to the affidavit of Tim MacNeil.) In para. 146 of my May 9, 2014 decision, I had allowed for the installation of posts perpendicular to the path as well as the two lines of poles on each side and parallel to the path.

[40] The recent installation is therefore not inconsistent with my decision. I do not understand Counsel's point that the pathway now appears "… to end at a point short of the full length." That is not the case; the Applicants clearly have a four-foot wide right-of-way from their properties, across the old road, and then to the Point. There is nothing shown in the photos which alters that fact. As well, I have no problem with the ropes strung between the poles running on each side of the path.

[41] I therefore accept Respondents' Counsel's suggestion for the revised wording of para 16. For greater clarity, I would also add the following at the end of the suggested paragraph: "The only vehicle/machine permitted on the pathway shall be a lawnmower." The full text of para 16 shall now read:

The Respondents may insert posts perpendicular to the pathway, and may also place two straight lines of posts, on either side of the pathway, so that the 4-feet

wide pathway remains clearly defined and so that vehicles wider than 4 feet cannot travel through the pathway. The only vehicle/machine permitted on pathway shall be a lawnmower.

[42] ***Paragraph 19:*** Shall remain unchanged. Terry has demonstrated that he will use any opportunity to irritate the Respondents. There is no need for either Terry or Tim to keep the pathway mowed. I am confident that the other Applicants will see to that task.

[43] ***Paragraph 20:*** Shall remain unchanged. There is no reason to prohibit the mooring of boats in the pond if Natural Resources, at its sole discretion, chooses to issue permit(s) for same.

[44] ***Paragraph 22(b):*** Shall be modified to read: "Lawn chairs, loungers, etc. are permitted, but they and any other items that are brought to the Point must be removed each day, and the responsibility for the same lies with whomever brought the same items."

[45] ***Paragraph 25:*** Shall be slightly modified to reduce the wharf restriction on the northern side of the Point. "… within 150 feet of the southern side of the Point or within ***100*** feet of the northern side of the Point."

[46] ***Paragraph 26:*** Shall remain unchanged. There is no need to impose a numerical limit regarding boats nor to add the wording suggested by Respondents' Counsel. I agree with Applicants' Counsel that to do so could provide a potential portal through which Terry would seek to exert control and incite dispute.

[47] ***Paragraph 27:*** Both sides agree to the following:

> Boats, canoes, kayaks and other water craft that can be carried on foot and do not require any vehicle to transport them may be brought to the Point via the pathway and launched from the Point, provided that
>
> (a) the transportation of said water craft does not interfere in any way with the width of the pathway as defined herein, and provided that
>
> (b) the transportation of said water craft does not in any way obstruct the pathway or in any other way interfere with the ability of any party to access the Point via the pathway, and
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> (c) the transportation of said water craft is in full compliance with Paragraph 26 herein.

[48] ***Paragraph 28:*** Shall remain unchanged. There is no evidence of undue numbers in the past. Terry would inevitably put on his sheriff's hat if I were to impose one, or add the wording suggested by his Counsel.

[49] ***Paragraph 31:*** Shall be modified to include the follows: "The Respondents are not permitted to remove soil or grade in or over the area of the pathway." It is

apparent in the evidence that Terry has done such work in the past in order to irritate or provoke the Respondents.

[50] ***Paragraph 32:*** Add before the first word "Respondents'": "Upon issuance of this Order …".

[51] ***Proposed Additional Paragraph*** regarding fuelling watercraft etc., liquor, and pets. There is no evidence of any difficulty in any of these areas in the past. Again, the proposed clauses appear to be an attempt by Terry to have a stick with which to prod the Respondents. The inclusion of these provisions would, as Applicants' Counsel suggests, increase rather than reduce potential sources of conflict. The proposed clauses will not be included in the Order.

Edwards, J.